(27,484)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 250.

FELIX GOULED

vs.

THE UNITED STATES OF AMERICA.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 28, 1920.

1 United States Circuit Court of Appeals for the Second Circuit.

FELIX GOULED, Plaintiff in Error,

against

THE UNITED STATES OF AMERICA, Defendant in Error.

Before Judges Ward, Rogers, and Hough.

This cause came here on a writ of error to a judgment of conviction entered in the District Court for the Southern District of New York.

On the hearing in this court certain questions of law arose, concerning which this court desires the instruction of the Supreme Court in order properly to decide the cause.

Statement of Fact.

The material facts revealed by the bill of exceptions and exhibits are as follows:

On 30th July, 1918, the Grand Jury for the Southern District of New York, by indictment duly charged plaintiff-in-error, together with one Vaughan and one Podell;

2 1st. With a conspiracy to defraud the United States,—in violation of Section 37, U. S. C. C.;

2d. With having devised a scheme or artifice to defraud and used the United States Post Office establishment for the purpose of executing the same,—in violation of Section 215, U. S. C. C.;

In January, 1918, certain officers of the Army of the United States attached to the "Intelligence Department" suspected at least Gouled and Vaughan (the latter being an officer of said Army) in respect of the honesty and integrity of their relations to each other concerning contracts for clothing or equipment with the United States.

At the same time one Cohen, who was a business acquaintance of Gouled's, was a private in said Army and also attached to said "Intelligence Department."

By the direction of the aforesaid officers, Cohen went to Gouled's office during the latter's absence and, under pretence of a friendly call, gained access to papers in said office and secretly possessed himself of several documents which he delivered to his said superior officers. One of these papers was by them subsequently turned over to the United States Attorney for the said judicial district.

Gouled did not know what Cohen had done until the latter appeared as a witness against him and on the witness stand detailed the circumstances.

3 On 17th June, 1918, an agent of the Department of Justice made affidavit before a United States Commissioner that there was in Gouled's office in New York City:

"Certain property, to wit: certain contracts of the said Felix Gouled with S. Lavinsky."

Which contracts,—continued the affidavit,—

"were used as the means of committing a felony, to wit: a violation of Section 39, U. S. C. C., in that the said Felix Gouled did use the said contracts as means for the bribery of a certain officer of the United States."

On this affidavit a search warrant, which was lost before trial and is not before this court, was issued by said Commissioner under authority of Title 11 of the Act of June 15, 1917 (40 Stat., 228).

By virtue of said warrant an unexecuted written agreement between Lavinsky and Gouled was seized and delivered to said United States Attorney.

Gouled has never been indicted for any offence covered by Section 39 U. S. C. C.

On 22d July 1918 another agent of the Department of Justice made affidavit before the said Commissioner that Gouled had at his said office,

"Certain letters, papers, documents and writings which * * * relate to, concern and have been used in the commission of a felony, to wit: a conspiracy to defraud the United States."

4 Upon said affidavit and by virtue of said Act of June 15, 1917, said Commissioner issued a search warrant directing the seizing and securing of "the letters, papers, documents and writings" described in the last mentioned affidavit.

Under this warrant there were seized an unknown number of papers, but especially two, together with the envelope containing one of them, viz:

(1) A written and signed contract between Gouled and one Steinthal; and

(2) A bill for disbursements and professional services rendered to Gouled by the defendant Podell,—who is an attorney at law.

These documents were likewise delivered to said United States Attorney.

All the paper writings so as aforesaid taken by virtue of said search warrants or either of them belonged to Gouled and were seized in his office, but none of them bore his signature except the Steinthal contract, and none had any pecuniary value except as so much paper stock; but all constituted evidence more or less injurious to Gouled when charged under the indictment subsequently found on July 30th.

After indictment found and before trial, motion was made by Gouled to compel said United States Attorney to return to him "all papers seized and taken from" his office on "the 17th of June and 22d of July respectively together with all memoranda, extracts taken therefrom and copies photographic or otherwise made therefrom."

This motion,—so far as the papers hereinabove enumer-
5 ated and described are concerned, was denied. The action of the District Court in denying said motion so made before trial is not assigned for error before us.

Subsequently and in October, 1918, the indictment came on for trial before a Judge other than the one who had entertained and denied the motion to return papers seized under said search warrant.

At said trial and before any evidence was introduced Gouled renewed the motion once denied and again (and on the same papers) demanded the return of all papers and documents seized under said search warrants or either of them.

The trial Judge followed the ruling previously made by his colleague and denied the motion, to which exception was duly taken.

The prosecuting attorney then offered in evidence against Gouled the paper writing so as aforesaid abstracted by Cohen from Gouled's office. Objection was made in that such action violated rights secured to Gouled by the 4th and 5th amendments to the Constitution of the United States. Objection was overruled and exception duly taken.

The prosecuting attorney did not offer in evidence the Stein-
6 thal contract taken from Gouled's office under the search warrant of July 22d, but he did offer in evidence against Gouled the duplicate original thereof obtained from the other party thereto, viz: Steinthal.

The introduction of this document was objected to because the seized original having been in the possession of the prosecutor, such possession must have suggested the existence of a counterpart, therefore the use of Steinthal's original as evidence against Gouled was also in violation of the rights secured to him by said 4th and 5th amendments. Objection was overruled and exception duly taken.

The prosecuting attorney also similarly offered in evidence the unsigned Lavinsky contract (seized under the search warrant of June 17th) and the Podell bill with its envelope (seized under the search warrant of July 22d).

Gouled objected to the admission of all these documents because they had been obtained and were being used in violation of rights secured to him by said 4th and 5th amendments. Objection was overruled and exception duly taken.

At trial Vaughan pleaded Guilty, the jury acquitted Podell and convicted Gouled, whereupon Gouled brought this writ of error and the cause is now pending in this Court.

7 *Questions Certified.*

1st. Is the secret taking or abstraction without force by a representative of any branch or subdivision of the Government of the

United States of a paper writing of evidential value only belonging to one suspected of crime and from the house or office of such person,—a violation of the 4th amendment?

2d. Is the admission of such paper writing in evidence against the same person when indicted for crime a violation of the 5th amendment?

3d. Are papers of no pecuniary value, but possessing evidential value against persons presently suspected and subsequently indicted under Sections 37 and 215, U. S. C. C., when taken under search warrants issued pursuant to Act of June 15, 1917, from the house or office of the person so suspected,—seized and taken in violation of the 4th amendment?

4th. If such papers so taken are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime of which he was accused in the affidavit for warrant,—is such admission in evidence a violation of the 5th amendment?

5th. If in the affidavit for search warrant under Act of June 15, 1917, the party whose premises are to be searched be charged with one crime and property be taken under the warrant issued
8 thereon,—can such property so seized be introduced in evidence against said party when on trial for a different offence?

6th. If papers of evidential value only be seized under a search warrant and the party from whose house or office they are taken be indicted;—if he then move before trial for the return of said papers and said motion is denied—is the court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted?

In accordance with the provisions of Section 239 U. S. Judicial Code, the foregoing questions of law are by the Circuit Court of Appeals of the United States for the Second Circuit hereby certified to the Supreme Court.

New York City, February 10, 1920.

H. G. WARD,
U. S. C. J.
HENRY WADE ROGERS,
U. S. C. J.
CHARLES M. HOUGH,
U. S. C. J.

9 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,
Second Judicial Circuit, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of Felix Gouled vs. The

United States, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said court, at the City of New York, this 10th day of February, 1920.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Felix Gouled vs. The United States of America. Certificate. Hough, Circuit Judge.

Endorsed on cover: File No. 27,484. U. S. Circuit Court of Appeals, 2d Circuit. Term No. 250. Felix Gouled vs. The United States of America. (Certificate.) Filed February 18th, 1920. File No. 27,484.

No. 250.

Supreme Court of the United States.

October Term, 1920

FELIX GOULED

vs.

THE UNITED STATES OF AMERICA.

On a Certificate from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR FELIX GOULED.

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AUTHORITIES CITED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1920.

FELIX GOULED, AGAINST THE UNITED STATES OF AMERICA.	No. 250.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement of the Case.

In January, 1918, certain officers of the United States Army, attached to the Intelligence Department thereof, suspected Gouled and one Vaughan of dishonesty in connection with their relations to each other concerning contracts for clothing or equipment with the United States. At that time Vaughan was an officer of said Army, and one Cohen was a private therein, both attached to the Intelligence Department thereof, and Cohen was a business acquaintance of Gouled. During Gouled's absence from his office in January, 1918, said

Cohen, by direction of the aforesaid officers went to Gouled's office, and under pretense of a friendly visit or call gained access to papers therein, and secretly possessed himself of several documents, which he delivered to his aforesaid superior officers. One of these papers was by said officers subsequently turned over to the United States District Attorney for said judicial district (fol. 2).

On July 30, 1918, the Grand Jury for the Southern District of New York returned an indictment charging Gouled, together with Vaughan and one Podell, (1) with a conspiracy to defraud the United States in violation of Section 37 U. S. C. C.; and (2) with having devised a scheme or artifice to defraud and with having used the United States Post Office establishment for the purpose of executing the same, in violation of Section 215 U. S. C. C.

On the trial of defendants, the prosecuting attorney offered in evidence against Gouled the paper writing abstracted from Gouled's office as hereinbefore set out. Gouled objected to the introduction of said paper on the ground that its admission violated his rights under the Fourth and Fifth Amendments to the Federal Constitution, which objection was overruled, and an exception duly taken (fol. 5). Gouled did not know how Cohen had obtained the paper that was received in evidence until Cohen appeared as a witness against him and on the stand detailed the circumstances (fol. 2).

Prior to the indictment of defendant and on the 17th day of June, 1918, an agent of the Department of Justice made affidavit before a United States Commissioner that there was in Gouled's

office in New York "certain property, to wit, certain contracts of the said Felix Gouled with one S. Lavinsky", which contracts "were used as the means of committing a felony, to wit, a violation of Section 39 U. S. C. C., in that the said Felix Gouled did use the said contracts as means for the bribery of a certain officer of the United States." The Commissioner, under Title XI of the Act of June 15th, 1917, issued a search warrant on this affidavit, which search warrant was lost before trial and was not contained in the record before the Circuit Court of Appeals. Under said warrant an unexecuted written agreement between Lavinsky and Gouled was seized and delivered to the United States District Attorney. Gouled was not indicted for any offense covered by Section 39 U. S. C. C. (fol. 3).

On July 22, 1918, another agent of the Department of Justice made an affidavit before the same United States Commissioner that Gouled had at his office "certain letters, papers, documents and writings which * * * relate to, concern, and have been used in the commission of a felony, to wit, a conspiracy to defraud the United States." The Commissioner, under the Act of June 15, 1917, issued a search warrant on said affidavit directing the seizure of all the "letters, papers, documents and writings" described in said affidavit. Under this warrant a number of papers were seized, but especially two with the envelope containing one of them, viz., (1) a written and signed contract between Gouled and one Steinthal; and (2) a bill for disbursements and professional services rendered to Gouled by the defendant Podell, who is an attorney. These papers were delivered to the United States District Attorney. All the papers taken

by virtue of said search warrants belonged to Gouled and were seized in his office, but none of them bore his signature except the Steinthal contract, and none had any pecuniary value except as so much paper stock, but all constituted evidence more or less injurious to Gouled under the indictment subsequently found against him on July 30th, 1918 (fols. 3, 4).

Before his trial Gouled made a motion to compel the United States Attorney to return to him all papers seized and taken from "his office on the 17th of June and 22nd of July respectively, together with all memoranda, extracts taken therefrom, and copies, photographic or otherwise, made therefrom". This motion was denied. The action of the District Court in denying said motion is not assigned for error (fols. 4, 5). The opinion of the Court on the motion to compel the return of the papers will be found at 253 Federal Reporter 770. The Court, in disposing of the motion, said that the question of whether or not the use of the evidence may compel the defendant to be a witness against himself was prematurely raised, and should be decided when the proof was offered on the trial.

In October, 1918, the indictment came on for trial before a judge other than the one who entertained and denied the motion to return the papers seized under said search warrant. On the trial and before any evidence had been introduced, Gouled renewed the motion theretofore denied, and again (on the same papers) demanded the return of all papers and documents seized under said search warrants, or either of them. The trial judge followed the rule which had been previously made by his colleagues and denied the motion, to which exception was duly taken (fol. 5).

The Steinthal contract taken from Gouled's office under the search warrant of July 22d was not offered in evidence by the District Attorney, but he did offer in evidence against Gouled the duplicate original thereof obtained from Steinthal, the other party thereto. Gouled objected to the introduction of this document because the seized original having been in the possession of the prosecutor, such possession must have suggested the existence of the counterpart; therefore, that such use of Steinthal's original as evidence against Gouled was also in violation of the rights secured to him by said Fourth and Fifth Amendments. This objection was overruled and an exception taken (fol. 6).

The District Attorney also offered in evidence the unsigned Lavinsky contract seized under the search warrant of June 17th and the Podell bill with its envelope seized under the search warrant of July 22d. The admission of all these documents was objected to by Gouled because they had been obtained and were being used in violation of his rights under the Fourth and Fifth Amendments to the Federal Constitution. The objection was overruled and an exception duly taken (fol. 6).

On the trial defendant, Vaughan, pleaded guilty. The defendant, Podell, was acquitted, and Gouled was convicted, whereupon Gouled brought the judgment of conviction to the Circuit Court of Appeals by writ of error, and the cause is now pending in that Court. That Court, under the provisions of Section 239 of the United States Judicial Code, certified for the decision of this Court the following questions of law, to wit:

First.—Is the secret taking or abstraction without force by a representative of any

branch or subdivision of the Government of the United States of a paper writing of evidential value only belonging to one suspected of crime and from the house or office of such person—a violation of the Fourth Amendment?

Second.—Is the admission of such paper writing in evidence against the same person when indicted for crime a violation of the Fifth Amendment?

Third.—Are papers of no pecuniary value, but possessing evidential value against persons presently suspected and subsequently indicted under Sections 37 and 215, U. S. C. C., when taken under search warrants issued pursuant to Act of June 15, 1917, from the house or office of the person so suspected—seized and taken in violation of the Fourth Amendment?

Fourth.—If such papers so taken are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime of which he was accused in the affidavit for warrant—is such admission in evidence a violation of the Fifth Amendment?

Fifth.—If in the affidavit for search warrant under Act of June 15, 1917, the party whose premises are to be searched be charged with one crime and property be taken under the warrant issued thereon—can such property so seized be introduced in evidence against said party when on trial for a different offense?

Sixth.—If papers of evidential value only be seized under a search warrant and the party from whose house or office they are taken be indicted—if he then move before trial for the return of said papers and said motion is denied—is the court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted? (fols. 6-8).

BRIEF OF ARGUMENT.

POINT I.

The secret taking and abstraction of Gouled's private papers by the officers of the Intelligence Department of the United States Army for the purpose, in the manner, and under the circumstances set forth in the Certificate, constitutes an unreasonable search and seizure under the Fourth Amendment to the Federal Constitution.

In construing the Fourth and Fifth Amendments, it is appropriate to refer to certain historical events that occurred prior to the Revolutionary War, which we think will throw great light on the construction of said amendments and the reasons for their adoption.

One of the many grievances of the colonies prior to the Revolution related to the enforcement of the Acts of Trade by means of Writs of Assistance. Because of the great expense of the seven years' war, England was in need of increased revenue. It was discovered that said Acts had not been observed by the merchants of America, and especially by those residing at Boston. Instructions were sent from the mother country to the customs officers in America requiring the strict enforcement of said Acts. It seems that special warrants were first used in searching for and seizing smuggled goods, but they proved to be of little use because they contained the name of the informer, and were returnable. The informer in this way became known to an excited and angry community, and other informers were intimidated

into silence. The search warrants also described the places where the smuggled goods were deposited, and authorized the seizure of goods only in the place described in the warrant. Usually when the officer reached said place to execute the warrant the goods had disappeared, and such writs were practically useless.

The customs officers thereupon resorted to general "Writs of Assistance," which were first issued during the reign of George II. These writs by their terms expired six months after the death of the King in whose reign they were issued. On the death of George II in 1760 the question of the issuance of new writs was raised. These writs were resented by the colonies as representing a system incompatible with their independence. This system of spying was very distasteful to them, and their resentment was intensified by the genius of James Otis, who is considered the pioneer of the Revolution. The more the matter came into public prominence and its legality was discussed, the more profound became the feeling against the principle of such writs as threatening the political freedom of the Colonies. In 1761 Lechmere, Surveyor General, made application to the Superior Court for new writs to himself and his officers. A number of Boston merchants petitioned to be heard in opposition to this application. The application was heard at the February Term, 1762, of said Court. Gridley appeared for Lechmere and James Otis and Thatcher for the merchants in opposition. The question was reargued in November, 1762, by the same counsel, and in December the judges were unanimous in their opinion that the writ should issue, and on December 2d a writ was issued to Paxton. This

and subsequent writs authorized the officers "to enter, go upon, and search any ship, boat, or other vessel riding along or being within or coming to said port of Boston, as well as to search the persons thereon, and in the day time to enter vaults, cellars, warehouses, shops and other places to search for smuggled goods."

Otis placed his argument in opposition to said writs on the broad ground of the rights of the colonists as Englishmen. In a fiery, passionate address before the Superior Court he declared that the use of such writs was an act of tyranny similar to the abuse of power which had "cost one King of England his head and another his throne." He asserted that life, liberty and property are derived not from social confernment but "only from nature and the authority of nature; that they are inherent and indefeasible by any laws, contracts, etc., which men can devise." The people took up the cry, and it spread from the New England hills to the valleys of the Hudson, Delaware and James rivers. The argument of Otis created a profound impression among the people of all the colonies, and in a short time they were roused to resistance against the infringement of their liberties.

Immediately following this controversy about writs of assistance in America there occurred the great controversy in England between John Wilkes and the ministry of Lord Bute. Wilkes became the champion of public opinion and established a paper called the "North Briton," in which he, as the leader of the people, denounced the Bute ministry for making the Treaty of Paris between England and Spain in 1762. The people believed that said treaty had been procured by corruption,

and there was a burst of popular indignation and protest against it. A supplemental number (No. 45) of the "North Briton" contained an offensive and caustic criticism not only of the Cabinet and the unpopular Peace of Paris, but also of the King's message at the prorogation. Three days before he received any notice that Wilkes was the author of the "North Briton," Lord Halifax, as Secretary of State, issued as such a general warrant "to search for authors, printers and publishers," who were to be brought before him for examination. The messengers who held this roving commission arrested within a few days about forty-nine persons on mere suspicion, and among them were Leach, a printer, and Wilkes. The latter was committed to prison. In the warrant for the arrest of Wilkes and Leach the messengers were authorized to search not only for printers and publishers, but "to apprehend and seize, together with their papers," such as they might suspect. After Wilkes had been removed from his house the messengers returned, and, after ransacking his drawers, carried away all his private papers. Wilkes at the time of his arrest was a member of the House of Commons, and he applied on a writ of habeas corpus for his release, which was granted because of his privilege, but he was immediately prosecuted for seditious libel.

It was claimed by the Secretary of State that the right to issue a general search warrant of that character was established by the practice of the Star Chamber which, after its abolition, had been revived and revested in the Secretary by the Licensing Act of Charles II. In order to test the validity of that special part of the writ directing

the seizure of his papers, Wilkes commenced an action against Wood, the under Secretary of State, who had personally superintended the search of his house and the carrying away of his papers. He obtained a judgment against Wood. (Howell's State Trials, Vol. XIX, p. 1153). The Court stated that the "office precedents which have been produced since the Revolution are no justification of a practice in itself illegal and contrary to the fundamental principles of the Constitution."

A few years later the same question was again presented in the case of Entick *v.* Carrington, (Howell's State Trials, vol. 19, p. 1029), when the illegality of a general search warrant issued by the Secretary of State to seize the papers of the author of a seditious libel, even when the author was named, was finally and decisively settled against such a writ. That case was an action of trespass for entering plaintiff's dwelling house in November, 1762, and breaking open his desks, boxes, etc., and searching and examining his papers, under a warrant directing the defendants to seize the plaintiff, and to bring him together with his books and papers before the Secretary of State to be examined. In this case Sergeant Glynn, counsel for plaintiff, in discussing the question of law as to the power of the Secretary of State to issue such a warrant, said, among other things:

> "A power to issue such a warrant as this is contrary to the genius of the law of England, and even if they had found what they searched for, they could not have justified it under the law of England; but they did not find what they searched for; nor does it appear that the plaintiff was the author of any of the seditious papers mentioned in the warrant. So that it now appears that this enormous trespass and

violent proceeding has been done upon mere surmise. But the verdict says that such warrants have been granted by Secretaries of State ever since the Revolution. If they have, it is high time to put an end to them, for if they are held to be legal the liberty of this country is at an end. * * * It is the publishing of a libel which is the crime, and not the having it locked up in a private drawer in a man's study, but if having it in one's custody was a crime, no power can lawfully break into a man's house and study to search for evidence against him. This would be worse than the Spanish Inquisition, for ransacking a man's secret drawers and boxes to come at evidence against him is like racking his body to come at his secret thoughts. The warrant is to seize all plaintiff's books and papers, without exception, and carry them before Lord Halifax. What? Has the Secretary of State a right to see all a man's private letters of correspondence, family concerns, trade and business? This would be monstrous indeed, and if it were lawful, no man could endure to live in this country."

In deciding the case, Lord Camden said that if such writs were upheld, "the secret cabinets and bureaus of every subject in the kingdom will be thrown open to search and inspection of a messenger whenever the Secretary of State shall think fit to charge or even suspect a person to be the author, printer, or publisher of a seditious libel."

He further stated:

"Papers are the owner's goods and chattels; they are his dearest property and are so far from enduring a seizure that they will hardly bear an inspection. Though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of

those goods will be an aggravation of the trespass and demand more considerable damages in that respect. Where does the written law lie that gives any magistrate such a power? I can safely answer there is none, and therefore it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society."

He further stated:

"Lastly, it is urged as an argument of utility that such a search is a means of detecting offenses by discovering evidence. I wish some cases had been shown where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil cases. It has often been tried but never prevailed. * * * In the criminal law such a proceeding was never heard of; and yet there are some crimes, such for instance as murder, rape, robbery and housebreaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself, because all the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust. And it would seem that searching for evidence is disallowed upon the same principle."

In 1683 Algernon Sidney was tried on a charge of high treason in the Court of King's Bench before Lord Chief Justice Jeffries. The treason charge in the indictment was compassing and

imagining the death of the king. The overt acts of this treason were, among other things, "composing and writing a false and seditious libel with intent to persuade the people of the lawfulness of rebellion." On his trial one Lloyd testified that under the authority of a warrant from the Privy Council directing him to seize Sidney's papers, he searched his house about the latter end of June, 1683, and found some papers on the table which he testified he seized and took into his possession in Sidney's presence. He produced the papers on the trial which he believed to be part of those papers. Sidney himself seems to have asserted in one part of his defense that the papers given in evidence had been found in his study after his imprisonment. (9 Howell State Trials, pp. 868 and 1006). In discussing the question as to whether the overt acts set out in the indictment were proven, Sidney said:

> "They have proved a paper found in my study of Caligula and Nero; that is compassing the death of the king, is it? * * * I am indicted for conspiring the death of the king because such a paper is found in my house. * * *" (9 Howell State Trials, 8, 59).

In volume 2, Phillips State Trials, page 101, it is said:

> "But the incredible account of Lord Howard (one of the witnesses against Sidney), was to be patched up by papers found in a private closet! He (Sidney) insisted, that he was not bound by law to give an account of such papers. The writing was not proved upon him, and, if proved, it was not a crime. It would be the extreme of injustice, and contrary to all law and reason, to charge him with a treasonable design for having in his posses-

sion such speculative writings—papers found in an unfinished and imperfect state, written many years before, not proved to have been shown, or seen, or intended for publication; not composed with a view to any particular occasion, or to any individual government; not connected with any political plan or design, nor of a character likely to incite a rebellion; but a mere political argument written on general principles and intended solely to oppose the dangerous tenets of a certain political writer. What could be more absurd than to pretend that the papers, written perhaps twenty years before, perhaps even more, could have the least bearing on any recent design? What more unjust, than to select scraps from a great number of papers, in order to found upon them some partial inference and conclusion as to the intentions of the writer, which could be fairly collected only from the tenor of all the writings taken together? In writing his private thoughts, and discussing such speculative subjects, he had done only what is daily and lawfully practiced by men of studious habits. To think, and to write his thoughts, is the privilege of every man; and, until he impart them to others, or publish them to the world, he is not responsible for them to any person, nor amenable to the laws of his country."

Solicitor General Finch replied on the part of the Crown and said that the doctrine in the written papers which he insisted on as proving and manifesting the treasonable design were the following:

"That the King derives all his power from the people; that it is originally in the people; that the measure of subjection must be adjudged by the Parliament; and if the King does fall from doing his duty, he must expect that the people will exact it."

The leading statesmen of Revolutionary times in America were familiar with the life and writings of Algernon Sidney, and especially with his trial for treason in 1682 and his conviction by means of seizing his private papers, which constituted the principal evidence against him.

Judge Cooley, in his Principles of Constitutional Law, in a note on page 231, says:

"The seizure of the papers of Algernon Sidney which were made use of as the means of convicting him of treason, and of those of Wilkes about the time that the controversy between Great Britain and the American colonies was assuming threatening proportions, was probably the immediate occasion for this constitutional amendment."

When the Federal Constitution drafted by the Convention of 1787 was submitted to the States for ratification, one of the principal objections urged against it was the lack of a bill of rights setting forth and protecting the "natural and inalienable rights and liberties" of man as contained in the British Constitution and in the constitutions of several of the States adopted during the Revolutionary War. The people of the States were afraid of this great central government to which they were about to delegate so much power and over which the individual States would have so little control. They remembered well the oppressions that they had suffered at the hands of despotic royalty. They had only recently, at great cost both of blood and money, freed themselves from the tyranny of their oppressors, and desired to prevent the return to the day of search warrants in England and writs of assistance in Boston. A number of the States demanded as a

condition of ratifying the Constitution that amendments should be proposed at the first session of Congress to guarantee and secure the protection of the people against the assumption of such arbitrary and unauthorized power on the part of the Federal Government in respect of life, liberty and property. These demands were satisfactory to the Federalists, who agreed that they would aid in procuring the adoption of such amendments. The Constitution was accordingly adopted and at the first session of Congress thereafter the first ten amendments were proposed and subsequently adopted, thus safeguarding the rights of the people against any of the feared encroachment on their rights by the officials of the new government. (Withers *vs.* Buckley, 20 Howard 84; Barron *v.* Baltimore, 7 Peters 243).

In *Boyd* vs. *United States, 116 U. S. 616,* Judge Bradley, in discussing the construction to be given to the Fourth and Fifth Amendments, said:

> "In order to ascertain the nature of the proceedings intended by the 4th amendment to the Constitution under 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the controversies on the subject both in this country and in England."

He then refers to the practice which had prevailed in Massachusetts of issuing writs of assistance, to which we have already referred. He continued:

> "These things (use of writs of assistance) and the events which took place in England immediately following the argument about writs of assistance in Boston were fresh in the memories of those who achieved our in-

dependence and established our form of government."

He then relates the controversy between the English Government and John Wilkes and refers to the case of *Entick* vs. *Carrington, 19 Howell State Trials 1029* and the opinion of Lord Camden, who pronounced the judgment of the court in that case. He said:

> "It (the opinion of Lord Camden) was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such by the English authorities on that subject down to the present time. As every American statesman during our Revolutionary and formative period as a nation was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the fourth amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures."

After quoting liberally from the opinion of Lord Camden, he said:

> "Can we doubt that when the fourth and fifth amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied upon as expressing the true doctrine on the subject of searches and seizures and as furnishing the true *criteria* of the reasonable and unreasonable character of such searches and seizures. Could the men who proposed those amendments in the light of Lord Camden's opinion

> have put their hands to a law like those of March 3, 1863, and March 2, 1867, before recited? If they could not, would they have approved the fifth section of the Act of June 22, 1874, which was adopted as a substitute for the previous laws? It seems to us that the question cannot admit of a doubt. They never would have approved of them. The struggles against arbitrary power in which they had been engaged for more than twenty years would have been too deeply engraved in their memories to allow them to approve of such insidious disguises of the old grievances which they had so deeply abhorred."

Continuing, he said:

> "And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purpose of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."

It is clear from the foregoing historical events that the Fourth and Fifth amendments were placed in the Constitution for the purpose of preventing a person being compelled to testify against himself on the trial of a criminal cause either by putting him on the stand or by the search for and seizure of his private papers and using them in evidence against him.

We think it is obvious under the above authorities that the act of Cohen in taking, without Gouled's knowledge and consent, the paper (fol. 2) that was afterwards introduced in evidence (fol. 5)

was a violation of Gouled's constitutional rights under the Fourth and Fifth Amendments. Under the facts stated in the Certificate Cohen, in taking such private paper was acting for and in behalf of the Government in ferreting out the commission of crime against the United States in connection with contracts between Gouled and the United States for clothing and equipment. It is not necessary that Cohen should have been acting directly under the direction of the Department of Justice in order to constitute him agent, representative or employee of the Government. Cohen did not take defendant's private papers for his own benefit; he took them as the agent and employee of the Government, and delivered them to his superior officers who were in the service of the Government. These officers in turn delivered said papers to the District Attorney of the district in which the seizure was made. The District Attorney caused said papers to be received in evidence against defendant on the trial of this criminal case. Surely, there is no ground for the claim that Cohen was acting independently of the Government and on his own authority, and for his own benefit, in taking and abstracting Gouled's papers to be used as evidence against him.

The Constitution of the United States is, by its own declaration (Article VI, Section 2), "the supreme law of the land". The powers of the Federal Government are exercised through three great departments—the legislative, executive, and judicial. All these departments are, of course, subject to the restrictions and limitations imposed by the Constitution on the Federal Government.

Dodge vs. *Woolsey, 18 Howard 331;*
Murray's Lessee vs. *Hoboken Land & Improvement Co., 18 Howard 272;*

Barron vs. *Baltimore, 7 Peters 243;*
Withers vs. *Buckley, 20 Howard 84.*

The first ten amendments to the Federal Constitution are restrictions exclusively upon the power of the Federal Government.

Fox vs. *Ohio, 5 Howard 410;*
Presser vs. *Illinois, 116 U. S. 252;*
Smith vs. *Maryland, 18 Howard 76.*

In *Boyd* vs. *United States, 116 U. S. 626,* Judge Bradley held that the principles announced in the case of Entick *vs.* Carrington applied "to all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacies of life."

In *Adams* vs. *United States, 192 U. S. 585,* Mr. Justice Day said:

> "The security intended to be guaranteed by the 4th amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted."

In *Bram* vs. *United States, 168 U. S. 532,* this Court, in speaking of the construction given the Fourth and Fifth Amendments in the Boyd case, said:

> "It was in that case demonstrated that both of these Amendments contemplated, perpetuating in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty, which had been secured in

> he mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change."

In *Weeks* vs. *United States, 232 U. S. 383,* this Court said:

> "The effect of the 4th amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

Judge Day further said at page 394:

> "In Adams *vs.* New York, 192 U. S. 585, this court said that the 4th amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law acting under legislative or judicial sanction. This protection is equally extended to the ac-

> tion of the Government and officers of the law acting under it. Boyd case, 116 U. S. 630. To sanction such proceeding would be to confirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution intended for the protection of the people against such unauthorized action."

Even if Cohen at the time he abstracted Gouled's papers exceeded his authority as an agent and employee of the Government, yet if they did not know how said papers had been obtained, they at least had knowledge of sufficient facts to put them on inquiry as to the manner in which they were obtained, which inquiry, if followed up with reasonable care, would have disclosed that said papers had been procured by an unlawful seizure by the Government's employee Cohen, and the Government officials are therefore charged by law with a knowledge of the manner in which said papers were obtained and, by using said papers against Gouled, adopted and ratified Cohen's wrongful act in taking them. As said in the Silverthorne case:

> "The case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the Government planned or at all events ratified the the whole performance."

To reiterate, the Fourth Amendment is a limitation and restriction upon the Federal Government and upon each and every department thereof, not alone upon the judiciary or the marshal, or any particular agent or employee of the Government, but upon every person who takes and seizes papers for the Government. The restraining hand of the Government reaches the department, a clerk

of the department, or any more exalted officer of the Government when representing the Government.

In construing the Fourteenth Amendment, it was held in the *Civil Rights Cases, 109 U. S. 13,* that the amendment prohibited every department and officer of the State from violating the Fourteenth Amendment; and in *Risley* vs. *Utica, 168 Fed. 737,* it was held that whoever by virtue of a public position under a State Government deprives another of any right protected by such amendment was guilty of a violation thereof, his act being the act of the State.

It is obvious therefore that Cohen was the employee and representative of the Government at the time he seized and took possession of Gouled's papers.

The fact that the private papers wrongfully taken may have no pecuniary value, but evidential value only, does not justify the seizure, and render the paper so taken admissible in evidence against the defendant. The object of the Fourth Amendment was to prevent all invasions on the part of the Government and its employees of the "sanctity of a man's home and the privacies of life." *Boyd* vs. *United States, 116 U. S. 630.* The essence of the offense prohibited by the Fourth Amendment is "the invasion of his indefeasible right of personal security, personal liberty, and private property."

Judge Bradley, in the Boyd case, further quoted from the opinion of Lord Camden as follows:

> "Papers are the owner's goods and chattels. They are his dearest property and are so far from enduring a seizure that they will hardly bear inspection."

In *Cooley on Torts, Vol. II, page 623*, it is said:

> "An important civil right is intended to be secured by the provisions incorporated in the National and State Constitutions, which in substance declare that unreasonable searches and seizures shall be unlawful, and that all persons shall be secure in their persons, houses, papers and effects against them. In their origin these provisions had in view the mischiefs of such oppressive action by the Government or its officers as the seizing of papers to obtain evidence of intended crimes; but their protection goes much beyond such cases; it justly assumes that a man may have secrets of business, of friendship, or of more tender sentiments, to which his books, papers or letters may bear testimony, but with which the public have no concern; that he may even have secrets of shame which are so exclusively his own concern that others have no right to pry into or discuss them."

There is nothing in the language of the Fourth Amendment to indicate that a search and seizure of the private papers of a person is not unreasonable if said papers have no pecuniary or market value. It is plain from the history of said provision and from its language that the Fourth Amendment does not require that the papers seized shall have a pecuniary value.

The use of *force* in gaining possession of a person's papers is not necessary in order to make the taking an unreasonable search and seizure under the Fourth Amendment. It was not even necessary that there should be an actual entry on Gouled's premises to constitute a violation of the Fourth Amendment. (Boyd *vs.* United States, 116 U. S. 626; Perlman *vs.* United States, 247 U. S. 7). In this case Gouled's papers were taken by

Cohen in Gouled's absence and without his consent and under pretense of a friendly visit. In other words, the Government procured by stealth and craft what they could not do in a lawful manner either by subpoena *duces tecum*, by order of the Court, or by means of a search warrant. The Government does indirectly and by deceit and evasion what the law does not permit it to do directly, and then claims that the law permits it to retain and use the fruits of its furtive acts because it used merely deceit and not threats and force. Was it the intention of the framers of the Fourth Amendment to permit defendant's indefeasible right of personal security, personal liberty and private property to be invaded in any such manner as this? Is the rule of evidence adopted by some courts that a court in passing on the admissibility of testimony will not go into a collateral issue to determine how the testimony has been obtained—will such a rule be permitted to defeat a substantial right of the citizen under the Federal Constitution? Is there any real difference between the invasion of the defendant's rights in this case and the facts surrounding the taking of the papers in the Weeks' case, and are not the facts more extenuating in the Weeks' case than in this case? In that case the marshal without authority of process, if any such could have been legally issued, visited the room of the defendant in the defendant's absence for the declared purpose of obtaining additional testimony to support the charge against Weeks, and having gained admission to the house, probably by means of a boarder, as stated by Judge Day, took from the drawer of a chiffonier certain letters written to the defendant tending to show his guilt, where-

as in this case Cohen during Gouled's absence gained access to his office, and secretly possessed himself of certain documents and papers therein contained, and Gouled did not learn of the deceitful act of his acquaintance until Cohen appeared on the stand as a witness against Gouled. Which is the more dangerous violation of the rights of a citizen—the marshal who goes openly to the house of the person arrested for the avowed and declared purpose of taking his papers for use in a criminal case against him, or the faithless friend who, while in the service of the Government, goes to defendant's office, in his absence, for the express but concealed purpose of procuring defendant's papers, and having gained access to said office by virtue of this counterfeit friendship, secretly and without the knowledge of anyone takes and carries away defendant's private papers for the purpose of delivering them to the prosecuting officers of the Government? In the case of the marshal, you have an opportunity to make a motion to compel the return of your papers; in the case of the supposed friend you have not. In opening and ransacking defendant's desk and taking defendants private papers found therein, Cohen was guilty of a trespass. His act is none the less wrong because he may have been admitted to the office by an employee of the defendant, if such was the case. This did not entitle him to trespass upon and take for the Government defendant's private papers. It did not entitle him to pry or spy into defendant's privacies of life. The taking of Gouled's papers in this case constituted an *invasion* on the part of an employee of the Government of the sanctity of Gouled's office and the privacies of his life, the acts denounced in the Boyd

case. Cohen used all the force that was necessary to take and carry away Gouled's papers in order to constitute a violation of the Fourth Amendment. The opening of the drawer containing the desired papers, the untying of a knot, the picking up of the paper from Gouled's open desk and unfolding it, done without his knowledge or consent, constituted a trespass on Gouled's right of privacy and an unlawful search and seizure under the Fourth Amendment. The Constitution does not require the use of any degree or amount of force at all; any slight physical exertion by means of which the employee of the Government takes and carries away, opens, spies into, and reads the private papers of a person, without his knowledge or consent, is an unlawful search and seizure under said amendment. The taking of Gouled's papers by Cohen contains "the substance and essence" of a search and seizure and effects their substantial purpose, and such taking is an unreasonable search and seizure in violation of the Fourth Amendment. (Boyd *vs.* United States, 116 U. S. 626; Weeks *vs.* United States, 232 U. S. 383; Entick *vs.* Carrington, 19 State Trials, 1029).

If the search and seizure in this case is sustained, it will result in nullifying this provision of the Constitution, as the Government will see to it that papers are taken hereafter by stealth and deceit, rather than by brute strength.

POINT II.

The Court erred in receiving in evidence the paper writing taken from Gouled's possession by Cohen.

The second question certified (fol. 7) relates to the action of the trial court in receiving in evidence (fol. 5) over Gouled's objection the papers secretly taken by Cohen from Gouled under the direction of Cohen's superior officers attached to the Intelligence Department of the United States Army (fol. 2). We have discussed under Point I the unreasonable character of the search and seizure by which said papers were obtained by Cohen, as well as the fact that Cohen was acting as the agent and employee of the Federal Government at the time he seized and took possession of said papers. The question we are now to consider is the correctness of the action of the trial court in receiving in evidence said papers over Gouled's objection.

We assume the second question is directed at the rule adopted by many courts that evidence which is pertinent to the issue is admissible, although it may have been procured in an irregular or even in an illegal manner by a trespasser.

The Courts of many States hold that if the proffered evidence is competent, relevant and material, the Court on the trial of a criminal case will not enter upon a collateral issue to determine the manner in which said evidence was obtained. Let us consider the history and development of this extraordinary doctrine which disregards and ignores the protection of the fundamental law of the land which was adopted for the very purpose

of preventing what many courts have permitted. The source of this extreme and unwarranted doctrine announced by many of the State Courts is the doctrine of the court in the case of *Commonwealth* vs. *Dana, 2 Metcalf 329*. The indictment in that case was for conducting a lottery under a statute which prohibited the sale of lottery tickets or the possession of the same with intent to sell, or to offer them for sale. The warrant had been issued upon proper information and under it the defendant was taken and the lottery tickets and material seized. Judge Wilde, speaking for the Supreme Court of Massachusetts, said:

> "We are also of the opinion that the warrant in this case is in conformity with all the requisitions of the statute and the declaration of rights. The complaint is under oath, and alleges probable cause to authorize the search and seizure. The articles seized are described and the place in which they were concealed is designated with sufficient certainty. There could be no difficulty in ascertaining by inspection the articles which the officer was directed to seize. The place of concealment is alleged to be the office of the defendant, 2 Devonshire Street, rear of 23 State Street. The defendant occupied that office, and the fact that another person occupied it with him cannot be considered as constituting a material variance."

The unlawful possession of the lottery tickets was sufficient to sustain the issuance of the search warrant in that case.

After holding that the warrant was legal and unassailable, the Court said:

> "Admitting that the lottery tickets and materials were illegally seized, still this is

no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they are pertinent to the issue, as they unquestionably were. When papers are offered in evidence the Court can take no notice of how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question. This point was decided in the cases of *Legatt* vs. *Tollervy, 14 East. 302,* and *Jordan* vs. *Lewis, 14 East. 306,* and we are entirely satisfied that the principles on which these cases were decided is sound and well established."

This is a noted decision for several reasons: (1) It is the first time such a doctrine was announced in a criminal case; (2) it has been followed by a number of State Courts and text book writers; and (3) if that rule of law is followed in the Federal courts it would nullify the Fourth and Fifth amendments to the Federal Constitution.

The case of *Legatt* vs. *Tollervey,* cited in said opinion, was an action on the case for malicious prosecution of plaintiff by defendant in Quarter Sessions for a felony, of which plaintiff was acquitted. Another bill was presented which the grand jury did not find. The plaintiff called an officer of that court who produced the indictment, but it did not appear that either the Court of Quarter Sessions or the Attorney General had authorized a copy to be given to the plaintiff, according to the rule of the Old Bailey, and the Court non-suited plaintiff. A motion was made for the setting aside of the non-suit on the ground

that the want of an order of the Court for a copy of the indictment was not necessary to found the plaintiff's right of action, whatever difficulty he might be under in obtaining the necessary proof. Best, Sergeant, opposed the rule and insisted that as the officer who produced the records from the Quarter Sessions had no authority from the Court nor fiat from the Attorney General, therefore the evidence was properly rejected. They referred to the general orders made by the judges at the Old Bailey in 16 Charles II that no copies of any indictment for felony should be given without special order, upon motion made in open Court at general gaol delivery. Shepherd, Sergeant, in support of the rule, insisted upon the admissibility of the records when ready to be produced, though the officer without an order for the purpose might not have been compellable to produce on subpœna *duces tecum*. The order can never be necessary to make the record or an examined copy evidence which is evidence *per se*, and the only evidence of the allegation of prior indictment. Lord Ellenborough, Chief Justice, said:

> "It is very clear that it is the duty of the officer charged with the custody of the records of the Court, not to produce a record but upon competent authority, which at the Old Bailey is obtained upon application to the Court, pursuant to the order which has long prevailed there; and with respect to the general records of the Realm upon application to the Attorney General. But if the officer shall, even without authority, have given a copy of a record, or produce the original, and that is properly proved in evidence, I cannot say that such evidence shall not be received. He may incur the penalty of his contempt of the Court, and he may be warned at the time of

his peril in so doing; and a discreet officer placed in such a position would doubtless, before he produced the record or give a copy of it, apply to the Court and state the circumstances of the case; and it cannot be doubted that he would be saved harmless in doing what, after such a disclosure, the Court should order him to do. But still I cannot help thinking that the rule laid down by Lord Chief Justice Lee in Jordan *vs.* Lewis is a correct one. The order made at the Old Bailey was there read by way of objection to the evidence offered, but the Chief Justice said that he could not refuse to let the plaintiff read the copy of the indictment, though obtained without an order of the Court for the purpose. If the production of such an order were essential to the validity of the evidence, then if the evidence of the record of acquittal on the former prosecution, or a true copy of it, were found as a fact in a special verdict, it would be immaterial unless the order of the Judge or court before whom it was tried, allowing it, were also approved and found. But can this be stated? Even if it were found negatively that the Judge or court had refused to allow the party acquitted a copy of the indictment; yet if, in the subsequent action for a malicious prosecution, the plaintiff gave in evidence that which he was able to prove to be in fact a true copy of the indictment, can it be said that it would not be available? With deference then to the opinion expressed by Mr. Baron Adams in the case cited by which alone the opinion of the learned Judge appears to have been governed on the trial of this case, I do not see how the circumstance of the copy, if the witness proved it to be a true copy of the record having been, as he says, surreptitiously taken, can affect the validity of the proof; though the officer's conduct in lending himself as a voluntary instrument to the plaintiff's purpose might proper-

> ly be animadverted upon by the court. The order made at the Old Bailey does not state actions against prosecutors cannot be maintained without an order first obtained for a copy of the indictment, but only that they cannot be maintained without copies. The other Judges assenting, the order for setting aside the non-suit was made absolute."

The question discussed in *Legatt* v. *Tollervey* is obviously a fundamentally different question from that involved in a criminal case where the Government wrongfully seizes papers in possession of a citizen and then seeks to use said papers to convict him of a felony. In the *Tollervey* case the question of the invasion of the constitutional rights of a defendant on trial was not involved.

Such a ruling, if applied in this case, will be subversive of an express constitutional guarantee, the enforcement of which is the avowed and peculiar duty of our courts, especially in cases so inherently involving questions of the life and liberty of the citizen.

This explains the inception of the doctrine that has heretofore existed in the various State courts of the country on this subject. Practically every opinion in the various State courts in which the question is discussed adopts the rule announced in *Commonwealth* v. *Dana, supra,* and lays down the rule that such constitutional guarantee does not cover the case of the acts of individual officers; that the State in neither judicial, legislative, nor executive capacity is chargeable with the suppression of wrongfully obtained evidence, and that the injured individual must seek his remedy against the officer for the trespass as though there was nothing more than an incidental civil injury involved.

We think a more wholesome view of the purpose, effect and scope of the Fourth and Fifth Amendments is entertained by this Court, as shown by its decisions in the Boyd, Weeks, and Silverthorne cases.

In *Weeks* vs. *United States, 232 U. S. 383*, the Court said:

> "The case in the aspect in which we are dealing with it involves the right of the Court in a criminal prosecution to retain for the purpose of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States Marshal holding no warrant for his arrest and none for the search of his premises. The accused without awaiting his trial made timely application to the Court for an order for the return of these papers as well as all other property. This application was denied. The letters were retained and put in evidence, after a further application at the beginning of the trial, both applications asserting the rights of the accused under the Fourth and Fifth Amendments to the Constitution. If letters and private documents can thus be seized and held and used in evidence against a citizen accused of a crime, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and so far as those thus placed are concerned, might just as well be stricken from the Constitution."

The Court further said:

> "We, therefore, reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under the color of his office in direct violation of the constitutional rights of the accused; that having made a sea-

> sonable application for their return, which was heard and passed upon by the Court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the Court should have restored these letters to the accused. In holding them and permitting their use upon the trial we think prejudicial error was committed."

In *Silverthorne Lumber Co.* vs. *United States, 251 U. S. 385,* the Silverthorne Company was indicted by means of papers wrongfully taken from the office of the Silverthorne Company, a corporation, by a United States Marshal and a representative of the Department of Justice without a shadow of authority. Application was made to compel the return of what had been unlawfully taken. In the meantime, the District Attorney had caused photographs and copies of material papers taken from defendant's possessin to be made. The Court ordered the return of the original papers on the ground that they had been taken from Silverthorne's possession in violation of his constitutional rights, but refused to compel the return of the copies which were impounded by the Court. A new indictment was framed based on the knowledge obtained from the copies thus made. Subpoenaes were then served on defendants commanding them to produce the originals, which they refused to do. Contempt proceedings were instituted against Silverthorne and the Silverthorne Company, and they were found guilty of contempt. The company was fined $250, and Silverthorne ordered imprisoned until he should purge himself of contempt by producing the papers called for in the subpoena. One ground of the refusal was that the order of the court was in violation of their

constitutional rights under the Fourth Amendment. Mr. Justice Holmes, speaking for this Court, said:

> "The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means, which otherwise it would not have had. The proposition could not be presented more nakedly. It is that, although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the Government can gain from the object of its pursuit by doing the forbidden act. *Weeks* vs. *United States, 232 U. S. 383,* to be sure, had established that laying the papers directly before the Grand Jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion, such is not the law. It reduces the Fourth Amendment to a form of words. 232 U. S. 393). The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence in a cer-tain way shall not be used before the Court, but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

If the essence of the Fourth Amendment is that evidence acquired by an unreasonable search and

seizure not only shall not be used in court, but shall not be used at all, as stated by Judge Holmes in the *Silverthorne* case, then where do we get the authority for adding to the plain terms of said amendment the condition that the benefits and rights of the citizen thereunder are secured to him only in the event he makes a motion before trial to compel the return of the papers wrongfully taken; in other words, the failure to make such motion because of error of judgment on the part of counsel or because of ignorance of the seizure made by the government officials or employees, in substance and effect, makes the seizure lawful. Where do the courts derive their authority for imposing any such limitation on acts which are a plain violation of the citizen's rights under such amendment? Have the courts the power to emasculate said amendment at the very time and place the government seeks to use such papers for the very purpose the amendment was designed to prevent? It has been held in a number of cases by this court that such amendment should be given a construction as broad as the mischief against which it seeks to guard. (*Counselman* v. *Hitchcock*, 142 U. S. 547; *Boyd* v. *United States*, 116 U. S. 626.) But in the case of this particular amendment the courts seem inclined to devitalize it under the influence of the principle that "the end justifies the means", and for this purpose have invoked the aid of a rule of evidence which results in nullifying the amendment in a great many cases of wrongful searches and seizures. It is clear that a motion before trial to compel the return of papers wrongfully taken is not under all circumstances required on the part of the injured person, and even if appropriate, is not the exclusive remedy. We think the sensible and rea-

sonable view of the rights of the individual, which said amendment was designed to secure and protect, requires that the courts prevent the use of such papers or of information derived therefrom, when the papers are offered in evidence or when the information secured by means thereof is offered in evidence. This is the only remedy that is as broad as the evil said amendment was designed to prevent. There are many cases where the rights of the citizen under the Fourth Amendment cannot be protected except at the trial. Even in the case where the court has made an order directing the return of the papers before the trial, such order does not divest the government officials and employees of the knowledge and information acquired from the unlawful use of the papers wrongfully seized and returned under order of court. The gist of the offense under the Fourth Amendment, so far as it relates to papers, is the invasion of the privacies of life by wrongfully acquiring knowledge of the contents of a person's private papers; the return of the physical paper but permitting the trespasser to keep and use the information wrongfully obtained therefrom is like compelling the thief to return to the owner the skeleton of the stolen cow, but permiting him to retain the flesh and blood. Under the rule announced in *Commonwealth* v. *Dana, supra,* and in the New York and other cases, the government officials can proceed with impunity to use the information derived from said returned papers because the courts will not turn aside to the collateral inquiry as to how the evidence offered by the government has been procured. Yet Judge Holmes in the *Silverthorne* case (251 U. S. 385), says in substance that under the fourth amendment the papers wrongfully seized cannot be used

by the government employees at all either before the court or elsewhere in the endeavor to convict an accused person.

Again, a person may know that his papers have been seized by the breaking of his doors and desks by someone in his absence but may not know that employes of the Government are the guilty persons until the papers are offered in evidence against him on the trial of a criminal action; or suppose the agents of the Government deny the possession of defendant's papers wrongfully seized, yet produce them on the trial; how in such and many other cases can the courts protect the citizen except when the evidence is offered on the trial.

In the Weeks case this court held that the trial court in refusing to compel the district attorney to return certain papers unlawfully taken from a defendant and in permitting their use on the trial, committed prejudicial error. Is not this defendant just as much entitled to protection against the use of his papers unlawfully seized as Weeks was? Are not the facts surrounding the seizure the same in each case, except that the seizure in the one was open, and in the other secret? Does the fact that the invasion of defendant's constitutional rights has been accomplished by the Government in such a manner that he did not discover it until the trial deprive him of all relief against the wrongful act of the Government? If it does, then will not such holding result in nullifying the Fourth and Fifth Amendments in many cases? Will not the zealous officers of the Government say we cannot compel the defendant to produce his papers by subpoena *duces tecum*, nor by order of court, nor by search warrant, nor by taking them *vi et armis*, but we

may induce a friend of the defendant to gain access to his house and premises and secretly take his private papers, of which fact he will not be aware until his trial, and then it will be too late to prevent the use of such papers by the Government? The remedy by motion must be limited to cases in which the defendant had knowledge of the unlawful seizure. We submit that under the principles announced in the Boyd, Weeks and Silverthorne cases, the admission in evidence of the papers procured by Cohen from the defendant's office in his absence was an unlawful search and seizure under the fourth amendment, and was also a violation of that clause of the Fifth Amendment which prohibits compelling a person to testify against himself in a criminal case, and the 1st and 2nd questions certified should be answered in the affirmative.

POINT III.

The receipt in evidence of the papers taken under the search warrants dated June 17, 1918, and July 22, 1918, was error because (1) said papers were procured by means of an unreasonable search and seizure; and (2) the defendant was compelled to give testimony against himself.

We contend that the search warrants issued on June 17th, 1918, and July 22nd, 1918, are null and void because a search warrant cannot under the Federal Constitution be issued for the *sole* purpose of procuring from defendant his private papers to be used in evidence against him in a criminal case; that the 3rd and 4th questions cer-

tified involve the constitutionality of the Act of June 15th, 1917; that said Act is unconstitutional so far as it may be held to authorize the issuance of a search warrant to procure evidence to be used against a person in a criminal prosecution, even though the private papers so seized may have been used in the commission of the crime for which he is on trial. The certificate of the Circuit Court of Appeals does not show whether or not the private papers obtained under these warrants and received in evidence against defendant were used as the means of commiting a felony.

It is well settled that a search warrant cannot under the Federal Constitution be issued for the sole purpose of procuring private papers from a person to be used in evidence against him on the trial of a criminal case. The Certificate shows that at the time of the issuance of the search warrants of June 17th, 1918, and July 22nd, 1918, the defendant was suspected of the commission of a crime and that the search warrants were issued for the purpose of procuring evidence to use against him, and that he was subsequently charged by indictment with the crime set forth in the warrant of July 22nd, 1918, but was never indicted for the offense described in the affidavit on which the warrant of June 17th, 1918, was issued. A motion was made by defendant both before and on the trial, to compel the Government to return to defendant the papers taken under such search warrant. Both these motions were denied for the reasons hereinbefore set out.

In *Entick* v. *Carrington*, 19 State Trials 1074, Lord Camden said:

> "Lastly, it is urged as an argument of utility that such a search is the means of detecting offenses by discovering evidence. I wish some cases had been shown where the law

forceth evidence out of the owner's custody by process. * * * But our law has provided no paper searches in these criminal cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself; because all the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that searching for evidence is disallowed upon the same principle * * *"

In *Black on Constitutional Law*, page 613, it is said:

"As a general rule, search warrants are to be employed only as an aid in the enforcement of the criminal laws. They may be issued for the recovery of goods alleged to have been stolen, for the discovery of merchandise smuggled into the country and concealed to avoid the payment of duties, for intoxicating liquors kept or intended for sale in violation of law, for instruments and apparatus used in gambling, for the seizure of lottery tickets or materials for drawing a lottery, and for forged warrants, writs, certificates or other such legal documents.—Nor is this warrant ever allowed to be used solely as the means of obtaining evidence against a person accused of crime. It is true that in some few cases, as in the search for stolen goods, the discovery of the article in question may furnish an item of evidence against the possessor of it. But in all such cases either the complainant or the public has some interest in the property or in its destruction, and the finding of evidence is not the immediate reason

for issuing the warrant. But it was settled by the common law in the case of the 'general warrants' and has always been the understanding of the American people, that this process could not be employed as a means of gaining access to a man's house or his letters and papers for the mere and sole purpose of securing evidence to be used against him in a criminal or penal proceeding. Such methods would also be inconsistent with the great principle of constitutional law in criminal cases that no man shall be compelled to furnish evidence against himself."

At page 614 the same author says:

"It is within the power of a state legislature, in the exercise of its powers of police, to declare the possession of certain articles of property (such as intoxicating liquors, explosives, obscene publications, or gambling devices), either absolutely or in particular places and under particular circumstances, to be unlawful because they would be injurious, dangerous, or obnoxious, and it may authorize the issuance of search warrants and the seizure and confiscation or destruction of such articles, so it be by due process of law."

At page 615 the same author says:

"There are some cases in which the privacy of the dwelling must be subordinated to the enforcement of necessary police regulations for the preservation of the public health, particularly in populous cities. Thus, it may be necessary to search private houses for the purpose of inspecting their sanitary condition, or to ascertain the existence of a nuisance detrimental to health, or to discover persons who are affected with a dangerous disease such as threatens an epidemic."

In *Cooley's Constitutional Limitations*, 7th edition, page 431, it is said:

"The warrant is not allowed for the sole purpose of obtaining evidence of an intended crime; but only after lawful evidence of an offense actually committed. Nor even then is it allowable to invade one's privacy for the sole purpose of obtaining evidence against him, except in a few special cases where that which is the subject of the crime is supposed to be concealed, and the public or the complainant has an interest in it or in its destruction. Those special cases are familiar and well understood in the law. Search warrants have heretofore been allowed to search for stolen goods, for goods supposed to have been smuggled into the country in violation of the revenue laws, for implements of gaming or counterfeiting, for lottery tickets or prohibited liquors kept for sale contrary to law, for obscene books and papers kept for sale or circulation, and for powder or other explosive and dangerous materials so kept as to endanger the public safety. A statute which should permit the breaking and entering a man's house, and the examination of books and papers with a view to discover the evidence of crime, might possibly not be void on constitutional grounds in some other cases; but the power of the Legislature to authorize a resort to this process is one which can properly be exercised only in extreme cases, and it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters, and papers exposed to prying curiosity, and to the misconstructions of ignorant and suspicious persons—all this under the direction of a mere ministerial officer.

"We think it would generally be safe for the legislature to regard all those searches and

seizures 'unreasonable' which have hitherto been unknown to the law and on that account to abstain from authorizing them, leaving parties and the public to the accustomed remedies."

In *Tiedeman on State and Federal Control of Persons and Property*, pages 788-789, it is said:

"Under no circumstances can a search warrant be issued in this country for the sole purpose of securing the necessary evidence for the State. Whenever the police officer shows probable cause for believing that stolen goods are secreted in the house of the supposed thief or some other person, and in all other cases where the house contains the goods the possession and use of which constitute the crime, that house may be searched, and so far, and in these cases, the State may, with the aid of a search warrant, procure evidence of the guilt of the accused. But ordinarily this is not permitted. A man's letters and papers and other effects cannot be searched in the aid of a criminal prosecution against him. Not only is this prohibited by the spirit of the constitutional provision in reference to the issue of search warrants, but likewise by another provision which provides that no one shall be compelled in any criminal case to be a witness against himself. But, as already stated, where the crime or misdemeanor consists of the possession or use of things, which are prohibited by the law, either because of their injurious effect upon the public, or because the goods belong to another, or when there is an unlawful detention of persons, search warrants may be issued for their recovery, when satisfactory evidence of their being stored in a particular dwelling is presented to the judicial officer who issues the writ."

Many lawyers have concluded from a hasty reading of the Fourth Amendment that a search warrant may be obtained for the asking for any purpose and that every seizure made under a search warrant is lawful, even where the papers seized are to be used in evidence against the person from whom they are taken. The above authorities, however, show the fallacy of this conclusion. Mr. Justic Bradley in *Boyd* vs. *United States, 116 U. S. 626*, refers to the different classes of cases in which a search warrant may be used to seize property or papers. He says:

> "The search for and seizure of stolen or forfeited goods or goods liable to duties and concealed to avoid the payment thereof are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the Government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own Revenue Acts from the commencement of the Government. * * * * So also the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessariily excepted out of the category of unreasonable searches and seizures. So also the laws which provide for the search and seizure of articles and things which it is unlawful

for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within this category. * * *"

"But when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession; and in the case of excisable or dutiable articles, the Government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment; and in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt; and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of chancery would direct on a bill for discovery; whereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property. * * *"

After quoting from the opinion of Lord Camden in Enthick *vs.* Carrington, he said:

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rum-

maging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory *extortion* of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."

But no case goes to the extent of holding that a search warrant may be issued to search for and take from the possession of the defendant his private papers for the sole purpose of using them in evidence against him, even though they may have been used in the commission of a crime. Of course, if the possession of said papers by the suspected or indicted person in itself constitutes a crime, then a search warrant could issue.

The Act of June 15, 1917, is unconstitutional so far as it may be claimed as authority for the issuance of warrants to search for and seize private papers from the possession of the owner, to be used against him in a criminal case.

Section 2, Title XI, Chapter 30, of an Act passed June 15, 1917, entitled "An Act to punish acts of interference with foreign relations, the neutrality and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes", provides that search warrants

may issue under said title upon either of the following grounds:

1. When the property was stolen or embezzled in violation of a law of the United States, etc.
2. When the property was used as the means of committing a felony, etc.
3. When the property or any paper is used in violation of Section 22 of this title.

Section 22 of said title provides:

> "Whoever, in aid of any foreign government, shall knowingly and wilfully have possession of or control over any property or papers designed or intended for use or which is used as the means of violating any penal statute, or any of the rights or obligations of the United States under any treaty or the law of nations, shall be fined not more than $1,000. or imprisoned for not more than two years, or both."

If the Government cannot compel a defendant to produce a private paper by subpoena *duces tecum*, to be used in evidence against him, because this would be compelling him to testify against himself in violation of the Fifth Amendment, and if the production of the same paper for the same purpose cannot be affected by a search and seizure because this would in substance and effect be a violation of the Fifth Amendment in that it would be compelling a person to testify against himself, and if any search and seizure that accomplishes the same purpose is an unreasonable search and seizure under the Fourth Amendment, how is it possible to hold that Congress can by statute authorize the issuance of a search warrant to search for and seize private papers of a person to be used

in evidence against him? Such a statute is unconstitutional because it is in violation of both the Fourth and Fifth Amendments. It accomplishes the same purpose as would be accomplished by a subpoena *duces tecum*. The issuance of a search warrant cannot change the effect of the transaction. If seizing the defendant's papers without warrant and using them in evidence against him would be a violation of the Fourth and Fifth Amendments, so would seizing them under a search warrant solely for that purpose.

The Congressional Record, 1st Session of the 65th Congress, pp. 3306 *et seq.*, and 3349 *et seq.*, shows that the search warrant title of said Act is based on the New York statute regulating the issuance of search warrants. The New York law on this subject, and similar laws in other States, we think, are the result of the rule adopted in various State courts that evidence which is pertinent to the issue in a criminal action is admissible even though it may have been procured by an unlawful search and seizure. Naturally, the effect of that ruling has been to stimulate raids by police and other officers on the homes and offices of persons charged with crimes in order to procure their private papers for use as evidence against them on the trial. While these raids are clearly unlawful and a violation of defendant's rights even under the State constitutions, they have been sanctioned by a majority of the courts so far as relates to the use in evidence of the private papers obtained thereby. In view of the fact, however, that such unlawful raids are calculated to result in homicides and to provoke breaches of the peace, the Legislatures of many States have sought to give said raids a legal standing by drawing a distinc-

tion between evidence used as the means of committing a crime and evidence not so used, and have enacted laws providing for the issuance of search warrants to procure possession of evidence of the former kind, even though it consist of private papers in the possession of a defendant. So far as a citizen's rights under the Fourth Amendment are concerned, should there be any difference in principle between private papers used as the means of committing a felony and private papers not so used, but just as important to the Government as evidence for the purpose of securing a conviction? The Government needs both kinds of papers solely as evidence. Both belong to defendant, and even if both could be used as evidence by the Government, defendant is entitled to the return of both alike after his acquittal or conviction.

Under the rule laid down by Lord Camden, there is no difference between private papers that have been used by defendant as the means of committing a crime and private papers not so used. The private papers seized in Gouled's possession, even if they have been used as the means of committing a felony, do not come within any of the common law exceptions laid down by Lord Camden, and fully restated by this Court in the Boyd case. There is no principle of law supporting any of said exceptions that confers the right to issue a search warrant for the sole purpose of seizing a man's private papers to use them in evidence against him in a criminal action.

The correct rule, we think, for determining when a search warrant may issue under the Constitution is whether or not the Government has the right to the possession of the defendant's prop-

erty (for which a search warrant is desired) for any purpose other than for use as evidence against defendant. If it has not, then a search warrant may not issue. If it has such right for some other purpose than for use as evidence, then the search warrant may issue. In the case of stolen goods, the person has neither the title nor the right of possession against the lawful owner, and the Government has the right to take possession in this peremptory and summary manner for the purpose of taking the property from the thief and delivering it to whomsoever may be entitled thereto, and incidentally to use it as evidence against the thief. In the case of counterfeit money, the possession may be *prima facie* evidence of a crime and the Government has a right to take possession and destroy said property and incidentally to use it as evidence either against the person from whose possession it was taken or any other person concerned either in uttering or circulating it; and the same rule applies to lottery tickets, burglar's tools, to a forged will or deed, to narcotics, and many other similar kinds of property. In all these cases, the possession by the person from whom taken is a crime, and the Government has some special property in or lien upon or right to the possession of the property as against the person holding the same, which independently of its use as evidence, entitles the Government to procure a search warrant for its seizure to be disposed of according to law.

Even if said Act of June 15th, 1917, regulating the issuance of search warrants be held constitutional, it does not authorize a warrant for the seizure of *private papers* in the possession of a person suspected of the commission of a crime.

The search warrants in this case were issued under the provisions of sub-division 2, Section 2, Title XI, Chapter 30, of said Act.

It is clear that Congress in drafting said Act drew a distinction between *property* and *a paper;* it did not intend that the word "property" used in said sub-division 2 of Section 2 of said Act should include *papers.* Said sub-division does not use the word *paper,* but only the word *property.*

The next sub-division (3) of said Section 2, authorizes the issuance of a search warrant "when the *property* or any paper is used in violation of Section 22" of said Title and said Section 22, makes it a penal offense for any one knowingly and wilfully to have in his possession or under his control in aid of any foreign government "any property or papers designed or intended for use or which is used as the means of violating any penal statute or any of the rights or obligations of the United States under any treaty or the law of nations." If Congress intended that the word *property* in the second sub-division of said Section 2 should include *a paper,* why did it consider it necessary in said sub-division 3 of Section 2 to insert after the word *paper* the phrase "or any paper"; and why, if the word *property* includes *a paper,* did Congress find it necessary to use the words "any papers" in addition to the word *property* in said Section 22 of Title XI, Chapter 30, of the Act of June 15th, 1917? We think that Congress intended that the word *property* used in said sub-division 2 of Section 2 should include only property the possession of which was a crime under the Federal Statutes; that possession of such property under the circumstances prohibited by law constitutes "property

by means of which a felony was committed" within the purpose and intent of said sub-division 2. The search warrant title of the Act of June 15th, 1917, can, in our opinion, be sustained only if the word *property* is so construed as not to authorize the seizure of private papers in the possession of defendant, unless the papers are of such character that the possession thereof is of itself a crime.

This construction of the word *property* is strengthened by the history of the Espionage Bill in Congress. The Bill (No. 291) introduced in the House on April 2, 1917, provided in Section 1 that before any search warrant should be issued, the officer or person desiring its issuance should make a written application, duly verified by his oath or affirmation, to the proper officer of the district wherein the *property or papers* are known or believed to be located, setting out the following matters:

(1) The authority under which the applicant seeks to enforce or assist in enforcing the law of nations, the treaty obligations or statute law of the United States, which he alleges has been, is being, or is intended to be violated;

(2) Facts upon which his knowledge is based that there is a violation of said laws, treaties, etc.;

(3) A description of the *property or papers* for which a search warrant is desired.

Section 2 provides for the issuance of a search warrant by the officer named in the statute upon his being satisfied that there is probable cause to believe that the *property or papers* described have been, are being, or are intended to be pos-

sessed, used or employed in the manner set out in said application.

Section 3 provides that

> Whenever any "*property or papers*" shall be seized or detained under such a search warrant, the owner or claimant may file with the officer issuing the search warrant his petition setting out his claim of title or ownership and any other facts tending to require the restoration of the *property or papers* to claimant, and the officer issuing the warrant shall determine the facts after notice to the District Attorney, and authorizes him to order the property restored to the owner, or "shall order the same retained in the custody of the person seizing the same to be used as evidence in any case or proceeding, civil or criminal, in which the United States may be interested, or to be otherwise disposed of according to law."

The Espionage Bill (No. 2) introduced in the Senate in April 1917 provided, among other things, that

> "A search warrant may be issued in accordance with the provisions of this Act for the purpose of searching any premises or person to discover any *property or papers* held, secured, or used in violation of or in aid of a violation of any penal law of the United States, or of a treaty of the United States, or of the rights or obligations of the United States under the law of nations."

When Bill No. 291 passed the House and went to the Senate, the Senate was considering its Bill. It did not take up the consideration of the House Bill but continued the consideration of its own

Bill and after perfecting and agreeing to its Bill, it took up the House Bill and, without giving it much consideration, adopted the Senate Bill, as it had been perfected, as an amendment for the House Bill by striking out all of the House Bill after the enacting clause and substituting the Senate Bill as it had been agreed upon in the Senate.

When these Bills went to a Conference Committee of the House and Senate, Title XI relating to search warrants was entirely re-written and said Committee agreed on the law in its present form. (See Congressional Record, First Session, 65th Congress, pages 3033, 3063, 3124 and 3306.)

It will be observed that the law as passed is radically different from the Bills introduced in both the House and Senate, particularly on the subject of the seizure of *papers*, and we contend that the law as it now stands only authorizes a search warrant for the seizure of papers when it is a criminal offense under Section 22 of the Search Warrant Law to have said papers in one's possession for the purpose of being used in violation of law in aid of a foreign government. The sweeping provisions of the original Bills introduced in the House and Senate with respect to the seizure of *papers* were finally so limited as to authorize the seizure of papers as distinguished from other kinds of property only where said papers were in the possession or control of a person in violation of the provisions of Section 22 of the search warrant title of the Espionage Law of June 15th, 1917.

It is evident that the change in the language of said Bill was caused by the opposition to the Bills based on the fact that the search warrant

title thereof was in violation of the Fourth and Fifth Amendments to the Federal Constitution. (See Congressional Record, First Session, 65th Congress, pages 1801 *et seq.*, 1850, 1853, 1854, 1856, 2065 *et seq.*)

We, therefore, contend that the papers seized and taken from Gouled's possession under the search warrants of June 17th, 1918, and July 22nd, 1918, for the sole purpose of being used as evidence against him, were unlawfully seized; that the Constitution prohibits a seizure for such a purpose; that the said seizure cannot be justified under the Act of June 15th, 1917, because said Act is in conflict with the Fourth Amendment if it be construed as authorizing the issuance of a search warrant for such purpose; that legislation cannot abridge a constitutional privilege (*Counselman* vs. *Hitchcock, 142 U. S. 547*); that no legislation can be enacted authorizing the issuance of a search warrant except in cases analogous to those in which search warrants have been issued at common law, and that such warrants could not be issued at common law for the sole purpose of procuring evidence from the possession of the defendant to be used against him in a criminal action; that said papers having been unlawfully seized and taken under search warrants were improperly received in evidence over Gouled's objection (*Silverthorne* vs. *United States, 251 U. S. 385)*; that the original contract between Gouled and Steinthal was unlawfully seized under the search warrant of July 22nd, 1918 (fol. 4); and that the possession of said original contract furnished the Government officers the information which led to the knowledge of the evidence of the duplicate original in Steinthal's possession, which duplicate original was received in evidence; that

said use of the original contract so unlawfully seized constituted a violation of defendant's rights under the Fourth Amendment *(Silverthorne vs. United States, supra)*; and that the admission in evidence of each of the papers described in said search warrants compelled Gouled to testify against himself in violation of the Fifth Amendment; that the word *property* in sub-division 2 of Section 2 of Title XI of Chapter 30 of the Act of June 15th, 1917, does not include *papers*.

POINT IV.

If papers belonging to a person are seized by virtue of a search warrant based on an affidavit which charges the commission of one crime, and if said person is not indicted for the commission of said crime, the papers seized cannot thereafter be received in evidence against said person when on trial for another crime.

The fifth question certified (fol. 8) evidently grows out of the seizure under the search warrant of June 17, 1918, of the unexecuted written agreement between Gouled and Lavinsky, which was delivered to the United States Attorney. The search warrant under which said paper was seized was based on an affidavit which charged that said paper was used as the means of committing a felony in violation of Section 39 U. S. C. C., to wit, the bribery of a certain officer of the United States (fol. 3). Gouled was not indicted for the offense described in said search warrant (fol. 3). As heretofore stated, after indictment and before the

trial, Gouled made a motion to compel the District Attorney to return to him "all papers seized and taken from his office on the 17th of June and 22nd day of July, 1918, respectively, together with all memoranda, extracts, etc., made therefrom." The certificate states that this motion was denied so far as the paper above described was concerned (fol. 3). The opinion of the Judge who passed on said motion shows that it was denied on the ground that all the papers that had come into the possession of the District Attorney by virtue of said seizures were returned to him at the hearing of said motion, except the letter written by defendant to Podell, a co-defendant, which letter the Court before whom said motion came held was admissible against Podell. In spite of this statement in the opinion of the Court, the Certificate shows that on the trial the unexecuted written agreement between Gouled and Lavinsky above described was seized under said search warrant and was received in evidence against Gouled on his trial in October, 1918 (fol. 5). The certificate does not say whether or not said unexecuted written agreement was used by Gouled as the means of committing one of the crimes of which Gouled was convicted. Under our view of the question here involved, it is not material whether or not the said unexecuted written agreement was used as the means of committing a felony by Gouled.

Although the Espionage Act of June 15, 1917 (Chap. 30, Title 11, 40 Stats. at Large, 228) of which the Search Warrant Law is a part, was emergency legislation and was rushed through Congress under the pressure of war conditions, and in spite of the objection that it was unconsti-

tutional (Congressional Record, 1st Session, 65th Congress, pp. 1720, 1753, 1801, 1850, 1853, 1854, 1856, 1862, 1863, 1864, 2065, *et seq.*) it is obvious that Congress endeavored to safeguard the rights of the individual as much as possible because of the harsh and drastic character of this *ex parte* proceeding, by means of which the defendant's property and papers were authorized to be seized and taken from his possession in order to convict him of a crime. The law provides that a search warrant may be issued by a Judge or United States Commissioner when the property was used as the means of committing a felony, in which case it may be taken on the warrant from the house or other place in which it is concealed or from the possession of the person by whom it was used in the commission of the crime. Before issuing the warrant, the Judge or Commissioner must examine the complainant and any witnesses produced by him, on oath, and require their affidavits or depositions to be subscribed by them. The affidavits or depositions must set forth facts showing probable cause for believing the truth of the grounds of the application; and the Judge or Commissioner must be satisfied from said affidavits that there is probable cause to believe the existence of the grounds set forth therein before he is authorized to issue a search warrant. The search warrant must set forth, among other things, the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and must command the officer forthwith to search the person and place named for the property specified, and to bring it before the Judge or Commissioner. The warrant must be executed within ten

days, else it becomes void. When he seizes property under said warrant, he must give a copy of the warrant, together with a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him or in whose possession it was found or, in the absence of any person, he must leave a copy of the warrant and receipt in the place where he found the property. The officer must forthwith return the warrant to the Judge or Commissioner, and deliver him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken and of the applicant for the warrant if they are present, which return must be verified by the affidavit of the officer in the form required by the statute. If required, the Judge or Commissioner must deliver a copy of the inventory to the person from whose possession the property was taken. If the person from whose possession the property is taken desires to controvert the grounds on which the warrant was issued, the statute authorizes him to produce his witnesses before the Judge or Commissioner who issued said warrant, who must proceed to take the testimony of the witnesses in relation thereto, which testimony must be reduced to writing and subscribed by each witness. If it appears that the property or paper is not the same as that described in the warrant or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the Judge or Commissioner must cause the papers to be restored to the person from whom taken; but if the Judge or Commissioner is of the opinion that the property or papers taken are the same as that described in the warrant and that there

is probable cause for believing the existence of the grounds on which the warrant was issued, he shall order the same retained in the custody of the person seizing it or to be otherwise disposed of according to law. Section 17 of said Search Warrant Law provides that:

> "The Judge or Commissioner must annex the affidavit, search warrant, return, inventory and evidence, and if he has not power to inquire into the offense in respect to which the warrant was issued, he must at once file the same, together with a copy of the record of his proceedings, with the clerk of the court having power to so inquire."

It is plain from the provisions of said Act that Congress intended to restrict the use of the papers seized to the prosecution and trial of the felony described in the search warrant papers. A specific offense described under oath calls for and justifies the Judge or Commissioner in issuing the search warrant; the same specific offense must be set forth in the warrant directed to the officer; the same offense confronts the owner and possessor at the time of the seizure; the same offense justifies the detention by the officer until he makes his return; the grounds for the same specific offense must be controverted by the owner before the Judge or Commissioner; the lack of evidence establishing probable cause for believing the commission of this same offense compels the Judge to cause the restoration of the papers seized to the person from whom taken; the existence of probable cause for believing the person guilty, not of some other crime, but the particular crime charged in the affidavit, requires the detention of the papers by the officer seizing the same or such other

disposition as the Judge or Commissioner may order. The Judge or Commissioner, if he has the power, must inquire into the commission, not of some other crime, but the very offense in respect to which the warrant was issued; and if he has not such power, he must deliver the search warrant papers to the clerk of the court who has power to inquire into the offense in respect to which the warrant was issued.

Can there by any clearer exposition of the purpose of Congress and of its intended restrictions on the use of the seized papers than the language of the Act itself? The person from whose possession the papers are taken must have notice of the particular crime which he is charged with having committed by means of the seized papers. He is also provided a summary and expeditious method of contesting the existence of the specific grounds set forth in the affidavit on which said warrant was issued, and if he is unsuccessful in said contest the papers are to be detained only in connection with the prosecution of the offense described.

Suppose that on the hearing before the Judge or Commissioner issuing the warrant provided for in Sections 15 and 16 of said Act, it should appear that there was no probable cause for believing the existence of the ground on which the warrant was issued, but suppose the United States District Attorney should object to the restoration of the papers on the ground that he had evidence that the owner from whose possession they were taken had committed another crime, and that he desired to use said papers to indict and convict said owner of said other offense, could the Judge or Commissioner, in the face of the statute directing the restoration of the papers, hold them in order to

enable the District Attorney to use them as evidence to convict the owner of another crime? Or suppose the District Attorney while the papers were in the possession of the officer making the seizure and before the hearing authorized under Sections 15 and 16 of that law, should use said papers before the Grand Jury in procuring an indictment against the owner for another crime, would the Judge or Commissioner be authorized or justified in refusing to obey the command of the statute to compel the restoration of the papers to the owner? It can be readily seen how the District Attorney can abuse the advantages and rights conferred on him by Congress to aid him in the prosecution of a specified offense, if he is permitted to use said papers to convict the owner of a different offense from that named in the affidavit. Suppose the property seized was not the property described in the search warrant, would the Judge or Commissioner, merely because the officer of the law had possession of said papers, be justified in holding them for the use of the District Attorney in the prosecution of the crime charged or of any other crime?

Notwithstanding the seizure under the search warrant and in spite of the fact that the papers are in the actual custody of the officers of the law for a specific purpose, they are still the owner's private property and are otherwise burdened with and subject to all the rights of privacy that inhered in said papers when in the actual possession of the owner. One of the most important objects Congress had in mind in the passage of said law was to prevent the use of the seized papers for any other purpose than that described in the affidavit and warrant; and if Congress has not accom-

plished this purpose the rights of the defendant under the Fourth and Fifth Amendments have not been safeguarded. The use made by the Government in this case of the unexecuted written agreement between Gouled and Lavinsky constituted a flagrant violation of defendant's rights under the Fourth and Fifth Amendments; and the trial court committed error in receiving in evidence against Gouled the unexecuted Lavinsky contract seized under a search warrant charging a different offense from that of which Gouled was convicted.

POINT V.

The sixth question should be answered in the affirmative.

The sixth question certified by the Circuit Court of Appeals is

> "If papers of evidential value only be seized under a search warrant and the party from whose house or office they are taken be indicted;—if he then move before trial for the return of said papers and said motion is denied—is the court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted?"

We are not informed by the certificate what issues of law and fact were involved on the decision of the motion made by Gouled to compel the return of the papers seized by the government under the search warrants dated June 17, 1918, and July 22, 1918 (fols. 4 and 5).

The opinion of the judge who denied the motion (*United States* v. *Gouled*, 253 Fed. Rep. 770) shows that the basis of the motion was that the search for and seizure of Gouled's papers was in violation of the fourth and fifth amendments to the Federal Constitution. It appears from the opinion that the court really denied the motion because the papers seized that had come into the hands of the District Attorney were returned at the time of the hearing of the motion before the court, except the letter sent by Podell to Gouled, which letter was referred to in the indictment as a letter sent in violation of Section 215 of the U. S. C. C., and it further appears from said opinion that the District Attorney asserted that said letter would be used as an exhibit on the trial. The court, in disposing of said motion, said that this letter was clearly admissible in evidence against Podell and should not be returned to defendant and thereupon denied the motion to compel the return of the papers. The certificate of the Circuit Court of Appeals shows that papers seized under said search warrants other than the Podell letter were received in evidence against Gouled (fols. 3 to 5).

The court in disposing of the motion does, in effect, state in its opinion that the papers were seized by virtue of a search warrant and that a search warrant could be issued as the means of obtaining evidence of crime (253 Fed. 770). This, in our opinion, is mere *dictum*, as it seems to us from the court's opinion that it denied the motion for the reasons heretofore stated. The court also stated in its opinion that the question whether the use of the evidence obtained by means of the search warrant compelled the de-

fendant to be a witness against himself was prematurely raised, and that the question as to whether there had been a violation of the fifth amendment should be decided when the proof was offered on the trial (253 Fed. 771).

The trial court is not prevented, by the denial of the preliminary motion to compel the return of the papers, from going into the question as to whether or not there was an unreasonable search and seizure under the fourth amendment or whether defendant was compelled to testify against himself in violation of the fifth amendment.

In the first place, the court in denying the motion to compel the return of Gouled's papers in effect holds that the search warrant was valid because by means thereof the government seized a letter written by Podell to defendant, which the court held was admissible in evidence against Podell and therefore, for that reason, the motion to compel the return thereof should not be granted. We are justified in inferring from the opinion that this was the only paper seized that was then in the possession of the District Attorney. So we contend that the opinion of the District Judge who passed on said motion shows that the question of lawful search and seizure under the fourth amendment was not passed on by the court in disposing of said motion and was not necessary to the disposition thereof. This question therefore was an open one for the consideration of the trial court on defendant's objection to the testimony when offered on the trial.

In the second place, there is no rule of the "law of the case" or *stare decisis* to prevent the trial court passing on the question of an unreasonable search and seizure in violation of the fourth

amendment. The burden is on the Government to show that the issues of law and fact involved in the disposition of said motion were such that the trial court should follow the decision of the court thereon in passing on the objection made by Gouled on the trial to the admission in evidence of the seized papers. The Government has failed to sustain this burden.

Even if said motion had been denied on the ground that the search and seizure did not violate Gouled's rights under either the fourth or fifth amendment, the trial court was not obliged to follow the ruling of the judge who heard said preliminary motion.

In *Plattner Implement Co.* v. *International Harvester Co.*, 133 Fed. 376, Judge SANBORN, speaking for the Circuit Court of Appeals, 8th Circuit, in discussing the question of one judge being bound by the decision of another judge of coördinate jurisdiction on the same question, said:

> "It is now contended that the ruling of the trial judge was right because he was not bound by the prior erroneous opinion of the resident judge upon the legal question whether or not a factor's lien may arise without an agreement of the parties. On account of the rule laid down in *Shreve* v. *Cheesman*, 69 Fed. 785, that rule is 'that the various judges who sit in the same court should not attempt to overrule the decisions of each other, especially in cases involving rules of practice. It is not unworthy of notice that the judge who tried the case below did not treat this rule as so imperative, that he thought it necessary to follow it in the disposition of the defense relative to the Nelson mower, but he directed a judgment for the defendant upon that defense, although the resident judge had previously sustained a de-

murrer to it as decisively as to the defense founded upon the alleged liens. On the other hand, he followed the rule in *Shreve* v. *Cheesman* in the trial of the latter defenses and refused to receive any evidence in support of them. The rule in *Shreve* v. *Cheesman*, 69 Fed. 785, is a rule of comity and of necessity. For obvious reasons, it applied with especial force to decisions which constitute rules of practice and of property, and by its terms it permits the 'most cogent reasons' such as a certainty that a previous ruling was erroneous, that no conflict would arise and no injustice would result from disregarding it, to present exceptions to it."

In *Wiggin* v. *Federal Stock & Grain Co.*, 77 Conn. 507, 516, Judge BALDWIN, of the Supreme Court of Connecticut, in discussing the effect of a ruling on a demurrer, said:

> "The jury were instructed that the ruling on the demurrer had conclusively established the validity of all the contracts, and removed any question as to that both from their consideration and from that of the court. While it is cutomary for a judge in disposing of points of law in a cause that may have been raised before other judges at an earlier stage of the proceedings to follow their decisions, he is not bound to do so. New pleadings intended to raise again a question of law which has been already presented on the record are not to be favored (*Hillyer* v. *Winsted*, 77 Conn. 304), but a determination so made is not necessarily to be treated as an infallible guide to the court in dealing with all matters subsequently arising in the case. If it be erroneous, and if the same point be presented in argument at a later stage of the proceedings, although before a different judge, he has the same right to reconsider the question, or to

> grant a rehearing on the issue closed on the prior pleadings, as if he had himself made the decision upon it. * * * As the prior ruling on the demurrer was correct, no injustice would have been done by the charge in this respect, had the question to which it pertained been in all respects the same as that which came before the jury. It was not the same. Evidence had been properly introduced upon the trial to show that a contract had been made with reference to the general customs and usages of those engaged in the kind of business conducted by the defendant. These usages formed a part of each contract. They might serve to explain the meaning of such terms as 'P. full' and the acts to be done by each of the contracting parties under certain conditions. These were matters which did not fully appear upon the face of the complaint."

So in the case before this court, the preliminary motion to compel the return of the papers was made on affidavits before trial (fols. 4-5). While it does not appear from the certificate what were the contents of said affidavits, it is probable that the facts set forth in said affidavit were not as full and complete as the facts that developed on the trial at the time Gouled objected to the introduction in evidence of the seized papers. In our opinion, the trial court was bound to pass on the objections urged by Gouled to the introduction in evidence of the papers which had been seized by the government under the search warrants of June 17th and July 22nd, 1918, and in so doing he was not bound to follow the decision of another judge of the same court rendered in passing on defendant's motion to compel the return of the papers as being seized in violation of his constitutional

rights. It was the right and duty of the trial judge to exercise his own independent judgment as to the validity of said objections, and if he believed, on full discussion and consideration of the questions of law and fact bearing upon the competency and relevancy of said testimony, that the ruling made on the motion by defendant to compel the return of his papers was erroneous and that no conflict would arise and no injustice result from disregarding it, he could, under the ruling announced in *Plattner Implement Co.* v. *International Harvester Co., supra,* decide the questions of law presented by said objections on his own personal views thereon. It would be a harsh rule, indeed, that would require the trial judge in such a case as this to follow a decision that he was satisfied was not the law—a decision that he felt sure would result in a reversal of the judgment of conviction, and especially one that involved the liberty of a citizen. The trial was the proper place where all the facts and circumstances bearing on the admissibility in evidence of the seized papers could be adequately and properly presented and developed, rather than on a motion made immediately after defendant's indictment, based on affidavits, when perhaps all the information relating to said seizures was not then known to the defendant and would probably not be developed until the trial.

If the sixth question is directed at the rule announced by some decisions that the trial court will not exclude evidence otherwise competent merely because it has been obtained in an unlawful manner, we have heretofore discussed this question under Point II of this Brief. This question, in our opinion, is answered by this court in the Silverthorne case, where it holds in substance that evidence obtained in violation of defendant's rights under the Fourth Amendment not only can-

not be used on the trial, but cannot be used *at all*. The trial court must therefore go into the question of the lawfulness of the seizure under the Fourth-Amendment when objection is made at the trial based on this ground.

Respectfully submitted,
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AUTHORITIES CITED.

STATUTES AND CONSTITUTIONAL PROVISIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

FELIX GOULED
v.
THE UNITED STATES OF AMERICA. } No. 250.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

This case is here on a certificate from the Circuit Court of Appeals for the Second Circuit.

The plaintiff in error was tried and convicted upon a charge of a conspiracy with one Vaughan and one Podell to defraud the United States in violation of section 37 of the United States Criminal Code and with having used the United States Post Office establishment in violation of section 215 of the Criminal Code. Vaughan pleaded guilty, the jury acquitted Podell, and convicted plaintiff in error.

In the Circuit Court of Appeals there was a contention made that the verdict and judgment were vitiated by reason of the fact that certain papers previously obtained from the office of plaintiff in error were admitted in evidence over his objection. The Circuit Court of Appeals has certified certain questions relating to this contention.

THE CERTIFICATE.

Two of the questions certified relate to a paper which was obtained without a search warrant. The remaining four questions relate to papers obtained while serving search warrants.

The facts relating to questions 1 and 2 are certified as follows:

> In January, 1918, certain officers of the Army of the United States attached to the "Intelligence Department" suspected at least Gouled and Vaughan (the latter being an officer of said Army) in respect of the honesty and integrity of their relations to each other concerning contracts for clothing or equipment with the United States.
>
> At the same time one Cohen, who was a business acquaintance of Gouled's, was a private in said army and also attached to said "Intelligence Department."
>
> By the direction of the aforesaid officers, Cohen went to Gouled's office during the latter's absence and, under pretense of a friendly call, gained access to papers in said office and secretly possessed himself of several documents which he delivered to his said superior officers. One of these papers was by them subsequently turned over to the United States Attorney for the said judicial district.
>
> Gouled did not know what Cohen had done until the latter appeared as a witness against him and on the witness stand detailed the circumstances. (Rec. p. 1.)

The paper so obtained by Cohen and turned over to the United States district attorney was offered in evidence. Objection was made on the ground that such action violated rights secured to Gouled by the Fourth and Fifth Amendments to the Constitution. The objection was overruled and exception duly taken.

Upon this statement of facts the court has certified the following questions:

> 1st. Is the secret taking or abstraction without force by a representative of any branch or subdivision of the Government of the United States of a paper writing of evidential value only belonging to one suspected of crime and from the house or office of such person a violation of the 4th amendment?
>
> 2d. Is the admission of such paper writing in evidence against the same person when indicted for crime a violation of the 5th amendment?

The facts relating to the remaining four questions have been certified as follows:

> On 17th June, 1918, an agent of the Department of Justice made affidavit before a United States Commissioner that there was in Gouled's office in New York City:
>
> "Certain property, to wit, certain contracts of the said Felix Gouled with S. Lavinsky." Which contracts, continued the affidavit, "were used as the means of committing a felony, to wit, a violation of Section 39, U. S. C. C., in that the said Felix Gouled did

use the said contracts as means for the bribery of a certain officer of the United States."

On this affidavit a search warrant, which was lost before trial and is not before this court, was issued by said Commissioner under authority of Title XI of the Act of June 15, 1917 (40 Stat. 228).

By virtue of said warrant an unexecuted written agreement between Lavinsky and Gouled was seized and delivered to said United States Attorney.

Gouled has never been indicted for any offense covered by section 39 U. S. C. C.

On 22d July, 1918, another agent of the Department of Justice made affidavit before the said Commissioner that Gouled had at his said office,

"Certain letters, papers, documents and writings which * * * relate to, concern and have been used in the commission of a felony, to wit, a conspiracy to defraud the United States."

Upon said affidavit and by virtue of said Act of June 15, 1917, said Commissioner issued a search warrant directing the seizing and securing of "the letters, papers, documents and writings" described in the last mentioned affidavit.

Under this warrant there were seized an unknown number of papers, but especially two, together with the envelope containing one of them, viz:

(1) A written and signed contract between Gouled and one Steinthal; and

(2) A bill for disbursements and professional services rendered to Gouled by the defendant Podell—who is an attorney at law.

These documents were likewise delivered to said United States Attorney.

All the paper writings so as aforesaid taken by virtue of said search warrants or either of them belonged to Gouled and were seized in his office, but none of them bore his signature except the Steinthal contract, and none had any pecuniary value except as so much paper stock; but all constituted evidence more or less injurious to Gouled when charged under the indictment subsequently found on July 30th.

After the indictment was found, but before the trial, a motion was made by Gouled to compel the United States district attorney to return to him all papers seized and taken from his office on the 17th of June and 22d of July, 1918, respectively, together with all memoranda, extracts taken therefrom, and copies, photographic or otherwise, made from them. This motion was heard and overruled by the District Judge presiding at that time and his action in this respect is not assigned for error in the Circuit Court of Appeals.

Later, the indictment came on for trial with another Judge presiding. At the trial, and before any evidence was introduced, the motion was renewed on the same papers. The trial judge followed the ruling of his colleague and denied the motion, to

which exception was taken. Whether this action was assigned for error in the Circuit Court of Appeals does not appear from the certificate.

The unsigned Lavinsky contract, seized under the search warrant of June 17, and the Podell bill, seized under the search warrant of July 22, were offered in evidence. They were objected to because they had been obtained and were being used in violation of rights secured by the Fourth and Fifth Amendments. The objection was overruled and exception taken. The Steinthal contract, seized under the search warrant of July 22, was not offered in evidence, but the duplicate original which had been obtained from Steinthal was offered. It was objected to because the seized original having been in the possession of the prosecutor, such possession must have suggested the existence of a counterpart, and therefore the use of Steinthal's original as evidence against Gouled was also in violation of the rights secured to him by the Fourth and Fifth Amendments. The objection was overruled and exception taken. Upon this statement of facts the following questions are certified:

> 3d. Are papers of no pecuniary value, but possessing evidential value against persons presently suspected and subsequently indicted under sections 37 and 215, U. S. C. C., when taken under search warrants issued pursuant to Act of June 15, 1917, from the house or office of the person so suspected, seized and taken in violation of the 4th amendment?

4th. If such papers so taken are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime of which he was accused in the affidavit for warrant, is such admission in evidence a violation of the 5th amendment?

5th. If in the affidavit for search warrant under Act of June 15, 1917, the party whose premises are to be searched be charged with one crime and property be taken under the warrant issued thereon, can such property so seized be introduced in evidence against said party when on trial for a different offense?

6th. If papers of evidential value only be seized under a search warrant and the party from whose house or office they are taken be indicted, if he then move before trial for the return of said papers and said motion is denied, is the court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted? (Rec. pp. 3–4.)

STATEMENT AS TO THE RECORD.

It is believed that the facts as certified by the Circuit Court of Appeals fully justify the answers which the Government will insist should be made to the questions certified. Unfortunately, however, the facts relating to the first and second questions are not quite accurately stated in the certificate. While this argument, of course, must be based on the facts as certified, there is one aspect of the case

in which the inaccuracy of the statement may be material and might cause the answer which this court makes to these questions to be misleading.

The Solicitor General, therefore, deems it his duty to call the attention of the court to the inaccuracy, as shown by the record in the Circuit Court of Appeals, so that this court may determine whether it is proper to answer the questions submitted or whether the court should require the whole case to be certified to it for decision.

The certificate states that Cohen went to Gouled's office *during the latter's absence* and, under pretence of a friendly call, gained access to papers in the office. The record in the Circuit Court of Appeals shows that the only testimony on this point was that of Cohen himself. His entire testimony on this question is printed as an appendix to this brief. This shows that he did not go to Gouled's office during the latter's absence. On the contrary, Gouled was present when he went in and they conversed for some time. During the conversation, however, Gouled left the room, and, while he was out, Cohen, seeing the paper on top of a flat-top desk, picked it up and put it in his pocket. If the court should be of opinion that the facts, as thus stated, would require that the answers to the questions submitted should be different from what they would be on the facts as certified, it is respectfully submitted that the court should exercise its jurisdiction to require the entire case to be certified here for decision.

PLAINTIFF IN ERROR'S CONTENTION.

In this case there is no claim that the accused himself was required to testify or to himself produce at the trial his private papers. The claim is simply that his constitutional rights were violated at the trial through the production by others of his private papers, which, he claims, had been obtained from him by means of an unreasonable search and seizure in violation of the Fourth Amendment, and that this production of his papers, in effect, compelled him to testify against himself in violation of the Fifth Amendment.

THE GOVERNMENT'S CONTENTIONS.

The Government contends, on the other hand, that (1) the papers in question having passed from the possession of plaintiff in error, without any violation of his rights under the Fourth Amendment, it can not be said that their production in evidence amounted to compelling him to testify against himself; (2) even if evidence is obtained by means of an unreasonable search and seizure, its admission in evidence, if otherwise competent, is not error unless the court has previously committed error in refusing to order it returned upon application seasonably made; and (3) in this case, since the plaintiff in error has not sought a review of the action of the court on the only application made before the trial, he must be regarded as acquiescing in that ruling and can not now complain because the evidence was subsequently used against him.

BRIEF.

The rights and remedies, under the Fourth and Fifth Amendments, of a defendant in a criminal case have so often been before this court that they would seem to be well settled. But apparently there is considerable confusion in the minds of the profession and the judges of the lower courts as to the scope and effect of some recent decisions. Some judges have felt impelled to hold that the Government can not be permitted to use evidence after it has been obtained from the accused in almost any manner except with his own consent. One judge has held that books and papers in the possession of Federal prosecuting officers, or information acquired from them, can not be used before a grand jury if it appears that, before coming into possession of the officials, they had been stolen from the accused by some person in no way connected with the Government and not acting under its authority or that of any of its officials. This prevalent misconception of what has been decided has a crippling effect upon the efficient administration of the criminal laws, and leads me to submit a much more detailed discussion of the questions involved than I would otherwise deem necessary.

This brief naturally is divided into two parts, namely:

(1) A discussion of the questions relating to the paper taken from plaintiff in error's office by Cohen in January, 1918; and

(2) A discussion of the questions relating to the papers taken from plaintiff in error's office by officers serving search warrants in June and July, 1918.

Part One.

I.

"Is the secret taking or abstraction without force by a representative of any branch or subdivision of the Government of the United States of a paper writing of evidential value only belonging to one suspected of crime and from the house or office of such a person a violation of the fourth amendment?"

The Fourth Amendment is as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The question is whether the rights secured to Gouled by this amendment were violated when secretly, but without the use of force or judicial or legislative authority, a paper was obtained from his office in the following manner:

The Army maintained an "Intelligence Department," under the direction of Army officers, for the purpose of investigating wrongs and irregularities affecting the Military Establishment and for obtaining information with respect to matters of importance to the War Department. Some of these Army officers suspected that there was something wrong in the relations between Gouled and an Army officer named Vaughan with respect to Army con-

tracts for clothing and equipment. It happened that among the enlisted men attached to the Intelligence Department was one Cohen, who was a business acquaintance of Gouled. These officers, therefore, in effect, directed Cohen to make a visit to Gouled and see what he could learn. Cohen accordingly went to Gouled's office (according to the certificate) in the latter's absence and "under pretense of a friendly call" gained access to the papers in the office, some of which he secretly put in his pocket and delivered to his superior officers.

It will be observed that—

(1) The certificate expressly negatives the use of force.

(2) Cohen did not act, or pretend to act, under any legislative authority or any judicial process.

(3) He was not connected in the remotest degree with the judicial department of the Government or subject to its directions.

(4) He was not an officer of any kind of the United States nor did he claim to be.

(5) He neither acted nor claimed to act under the direction or even with the knowledge of any officer charged by law with any duty in the administration of the criminal laws of the United States.

(6) He did not enter the office or obtain the papers under claim of right or authority or under color of any office.

(7) He entered under the ordinary privilege of a friend and used the same privileges to obtain access to the papers.

(8) The most that can be said is that, entering the office as a friend and resorting to the use of no force, he was accorded access to papers which he stole and carried away.

Either actual force or legal compulsion is necessary to constitute an unreasonable search and seizure.

The question above quoted has arisen during the consideration by the Circuit Court of Appeals of a judgment of conviction in a criminal case. The ultimate question, of course, is whether the judgment shall be reversed on account of the admission in evidence of a paper obtained as above stated. Since the accused was not required to himself produce the paper on the trial, or to testify with respect to it, if there is to be a reversal, it must be on account of the manner in which the paper was obtained. The primary inquiry, therefore, is whether the facts above stated constitute an unreasonable search and seizure within the meaning of the Fourth Amendment.

Since the paper in question was not obtained by the use of judicial process, it is not necessary, for the purpose of answering this particular question, to consider under what circumstances a search warrant may lawfully be issued and served. The present inquiry is whether there was such a search and seizure as is condemned by the Constitution.

The condemnation of the Fourth Amendment does not extend to every search and seizure, but only to those which are unreasonable. A search made by invitation or with consent freely given could not, of course, be called an unreasonable search. That which

a man asks to be done, or freely permits to be done, can not be said to be done in violation of his rights, for it is, in effect, his own act.

It is safe to say that, for a long time, it was generally supposed that there could be no such thing as unreasonable search and seizure without at least a show of physical force; that is, physical force must either be used or threatened in order to make the search. If, under claim of authority, the right to search was demanded under circumstances indicating that the search would be made by force, if necessary, the fact that actual resistance by force was not offered would not prevent the search being unreasonable. But it was generally supposed that, before a violation of the Fourth Amendment could be claimed, it must be shown that there was at least a show or threat of force. This, however, was modified to some extent by the case of *Boyd* v. *United States* (116 U. S. 616). In that case there was no actual search and seizure and no physical force was used. The defendant himself produced the papers on the trial, over his objection. He did this under an order of the court authorized by an act of Congress. The Act did not purport to give the court any power to actually enforce the order. It left the defendant free to obey or disobey as he might see fit. But this option was subject to the condition provided in the Act that, if he declined to obey the order, the affidavit of the United States district attorney, upon which the order had been made, should be taken to

be a true statement of the contents of the paper and should be admitted as evidence thereof. These were the provisions of the Act of Congress of June 22, 1874 (18 Stat., c. 391, sec. 5, p. 187). That Act was not applicable to cases other than criminal cases. The *Boyd case* was a case in which forfeiture of property for a violation of the revenue or customs laws was involved. The court held, however, that an action for the forfeiture of property as a result of a violation of the revenue or customs laws was a case to which the Act applied and with respect to which the defendant was entitled to the rights secured by both the Fourth and Fifth Amendments. The court was unanimous in the opinion that the effect of this proceeding under legislative authority was to compel the defendant to give evidence against himself in a criminal case, and hence violated the Fifth Amendment. A majority of the court was of opinion that it also amounted to an unreasonable search and seizure, and, therefore, violated the Fourth Amendment. Disposing of the contention that the Act of the defendant in producing the papers was voluntary, and that they were not taken from him by any search and seizure, it was said:

> That is so; but it declares that if he does not produce them the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production. (Id. pp. 621–622.)

And, taking the view that compulsion of this kind was equivalent to the physical force which would be necessary to serve a search warrant, the court said:

> It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure. (Id., p. 622.)

The holding is that force is a material ingredient in any unreasonable search and seizure, though this need not always be actual physical force, but that such force is present when a legislative Act requires the accused to either surrender his papers or submit to severe pains and penalties. The rule requiring force as an ingredient has not been further modified by any later decisions of this court. On the contrary, when the rule of the *Boyd case* has been applied, the court has been careful to show that that rule rests upon the proposition that compulsion by legislative or judicial authority is the equivalent of physical force by which, as a result of a search, a man is dispossessed of his property. Thus, in the case of *Hale* v. *Henkel* (201 U. S. 43), a subpœna *duces tecum* was held to amount to an unreasonable search and seizure because it was too general and sweeping in the description of the books and papers which it required to be produced. In that case the subpœna required an

officer of a corporation to produce books and papers belonging to the corporation. The court held that neither the corporation nor its officer could refuse to produce any book or paper belonging to the corporation upon the ground that it would tend to incriminate either the corporation or the officer. The ground upon which the particular subpœna under consideration was condemned was thus stated by Mr. Justice Brown:

> We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd case*, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpœna duces tecum*, against which the person, be he individual or corporation, is entitled to protection. Applying the test of reasonableness to the present case, we think the *subpœna duces tecum* is far too sweeping in its terms to be regarded as reasonable. (Id. p. 76.)

In other words, legal compulsion is the equivalent of the physical force which is a necessary ingredient of an unreasonable search and seizure. It would seem, therefore, to be settled that there can be no such thing as an unreasonable search and seizure without the use of physical force or its equivalent—legal compulsion.

In the present case the certificate expressly negatives the use of force of any kind. Cohen entered the office, not under any claim of right, but as a friend. He gained access to the papers in the same way. He had and claimed to have no legal process. No legislative Act gave him authority, and he claimed no authority under any such Act. Physical force was not used and there is no pretense of any legal compulsion to which Gouled was subjected. This alone precludes any conclusion that there was a violation of the Fourth Amendment.

The Fourth Amendment is a limitation upon the powers of the Federal Government. It is not violated by a search and seizure, however wrongful, which is not made under governmental authority, real or assumed, or under color of such authority.

It must be remembered that the Fourth Amendment, like the other amendments adopted at the same time, was adopted for the purpose of making clear certain limitations upon the powers previously granted by the Constitution to the Federal Government. It does not purport to control the conduct of private citizens or individuals. It is a simple limitation upon the powers of the Federal Government. The well-known historical facts which led to its adoption show this to have been the purpose—the language used will admit of no other construction. It was never supposed, I believe, that these amendments afforded security against anything except governmental action. It was, however, early in our history claimed that the restrictions upon governmental action which they imposed applied as well

to the State governments as to the Federal Government, but in *Barron* v. *The Mayor and City Council of Baltimore* (7 Pet. 243), Chief Justice Marshall disposed of this contention saying, at page 249:

> But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.
>
> In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the States. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

That the sole purpose of this and other amendments adopted at the same time was to protect the citizen against governmental encroachments upon

his rights has always been recognized by this court. In the *Boyd Case, supra*, what was complained of was action taken under the express authority of an Act of Congress. There was, therefore, no question but that this was governmental action. And in *Adams* v. *New York* (192 U. S. 585) it was said (p. 598):

> The security intended to be guaranteed by the Fourth Amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted.

If taken literally, this language would lead to the conclusion that there could be no violation of the Fourth Amendment unless the search and seizure is made under judicial process or unless compulsion is applied by virtue of an Act of Congress. It might be supposed, therefore, that a search and seizure by an officer without any judicial process would not be within the protection of the amendment. That this was not intended, however, was made plain in *Weeks* v. *United States* (232 U. S. 383), where it was said:

> In *Adams* v. *New York* (192 U. S. 585) this court said that the Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law acting under legislative or judicial sanction. This protection is equally extended

> to the action of the Government and officers of the law acting under it. (*Boyd Case, supra.*) To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action. (Id. p. 394.)

The precise case to which the protection of the Amendment was thus extended was stated as follows:

> We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant. (Id. p. 398.)

That it was not intended to apply the rule to the acts of an officer of the Federal Government merely because he happened to be such an officer, but only to such acts of his as are done under color of his office or under a claim of authority, was made clear throughout the opinion. Thus it was said, at page 393:

> The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises. * * * The United States marshal could only have invaded the house of the accused when armed

> with a warrant issued as required by the Constitution, upon sworn information and describing with reasonable particularity the thing for which the search was to be made. Instead he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the Government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action.

And at page 397 it was said:

> If such a seizure under the authority of a warrant supposed to be legal constitutes a violation of the constitutional protection, *a fortiori* does the attempt of an officer of the United States, the United States marshal, acting under color of his office without even the sanction of a warrant, constitute an invasion of the rights within the protection afforded by the Fourth Amendment.

It will be seen that, throughout the opinion, the court is careful, when speaking of acts of officers of the United States, to limit what it says to such acts *when done under color of office or authority.*

In *Silverthorne* v. *United States* (251 U. S. 385), the court is again careful to recognize that, in order to be within the protection of the Fourth Amendment, the acts of an officer of the Government must be done under color of office or authority. Thus it was said at page 391:

> Color had been given by the district attorney to the approach of those concerned in the act

> by an invalid subpœna for certain documents relating to the charge in the indictment then on file. Thus the case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the Government planned or at all events ratified the whole performance.

In other words, the seizure was made by a United States marshal acting under color of his office and under color of a subpœna, although an invalid one. It was said in the *Silverthorne case* that the principle applicable was satisfactorily stated in *Flagg* v. *United States* (233 Fed. Rep. 481, 483). In the latter case it appeared that Flagg had been arrested at his place of business and all his books and papers seized without a warrant and taken to the office of the United States attorney, where a warrant was sworn out. There was some uncertainty as to the authority under which the officers making the arrest and seizure were acting, but after considering the evidence the court reached the conclusion that the United States, acting through its accredited agents, was responsible for the arrest of the defendant and the seizure of his property. And the decision that the seizure was unconstitutional was based on *Weeks* v. *United States, supra*, from the opinion in which the following was quoted:

> We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the

> defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. (Id., p. 398.)

In the *Weeks case, supra,* it is made clear that the protection of the Fourteenth Amendment is only against governmental action on the part of the Federal Government. In that case the original seizures had been made by local police officers, who turned the papers over to the Federal authorities. Later, another seizure was made by the United States marshal. On an application, seasonably made, to require the return of these papers the court held that the act of the marshal was a violation of the Fourth Amendment and that the papers seized by him should be returned. With respect to the papers then in possession of the same Federal authorities, but which had been seized by the local police officers, the court said (p. 398):

> As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the Amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the Federal court, under what supposed right or authority does not appear. What remedies the defendant may

> have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies.

There would seem to be no room for doubt that the searches and seizures against which the Fourth Amendment gives protection are only those which are made under legislative or judicial authority of the United States, or by an officer of the Federal Government acting officially, under claim of right, and under color of his office. There is no protection given by the Fourth Amendment to the books or papers of a citizen merely because they are his private property.

In the present case there is no pretense that Cohen acted under any legislative or judicial authority, either real or assumed. He was not an officer of the the United States in any sense. He was merely a private in the Army. His superior officers, under whose direction he went to Gouled's office, were not officers of the United States charged by law with any duty in connection with the administration of the criminal laws. He did not enter the office or obtain access to papers under any claim of right or under any pretense or color of official authority. His act, therefore, could not be said to be governmental action on the part of the United States. It follows, therefore, from the authorities cited, that in what he did there was no violation of the Fourth Amendment.

Even if Cohen had been a United States marshal, what he did would not constitute a search and seizure in violation of the Fourth Amendment.

Every search and seizure made by an officer without a search warrant is not within the condemnation of the Fourth Amendment. It may be conceded that if an entry is made into a house by the use of authority or force and a search is then made, the rights secured by the Constitution will be infringed. But it is the right and duty of the Government to secure evidence of crime, even from the accused himself, if this can be done without violating his constitutional rights. These rights are not violated if an officer goes to the accused and asks and is granted permission to enter his house or his office. Equally they are not violated if the officer, without express invitation or permission, enters a place of business which is open to the public. And again, if the personal relations existing between the officer and the accused are such that the former is in the habit of visiting the latter at his office or his home, there is nothing unlawful in his making such a visit, even though he may not disclose that he is in search of evidence. When an officer has lawfully entered a house or an office in any of these ways, the Constitution does not require him to shut his eyes to any evidence of crime that may be open to his observation. He does not do violence to any constitutional rights if he asks the accused questions the answers to which may incriminate him. The accused has the right to refuse to answer such questions, but the officer has an equal right to ask them. The officer

may rightfully ask to be shown any document believed to be in the possession of the accused.

Again, the accused may refuse to show the document, but if he does show it, it will have come to the hands of the officer without any unlawful search. If, upon thus receiving it, he finds that it contains material evidence and keeps it, it is difficult to see how it can be said that the constitutional rights of the accused have been violated. He himself has shown the paper and thus disclosed evidence which he had the right to withhold; but having shown it, if it should be left in his possession, and he should afterwards refuse to produce it, this would be sufficient basis for admitting secondary evidence, and the officer would be a competent witness to testify to its contents. The retaining by the officer of the paper after it has come to his possession, without violating the constitutional rights of the accused, then, is merely the securing of the best evidence of what could otherwise be shown by secondary evidence. In the absence of a forcible entry and a search under color of his office, there is no ground for saying that the officer has made an unconstitutional search and seizure. By retaining the paper, he may have personally been guilty of a breach of confidence, or if he retained it secretly and without the knowledge of the accused, he may, as an individual, be guilty of larceny. But he has not, under color of his office, and as a governmental act, violated the Fourth Amendment. No officer is a general agent of the

United States so that everything he does will bind the Government. His authority is limited and prescribed. Within that authority he acts for the Government, and the Government is, morally at least, responsible for what he does.

In cases in which he does without a warrant things which the law authorizes him to do under a warrant it may be with propriety said that his action is official if he assumes to act under color of his office, and thus uses the power of the Government to overcome the will of the accused. But when he makes no claim to be acting officially or with authority, uses no force or threat of force, but merely does what any other individual might do under the same circumstances, there is nothing in his conduct which is official or binding upon the Government. The seizure which is condemned by the Fourth Amendment is one which is made as the result of such a search as is condemned by the same amendment. If there is no such search, then the seizure of that which is open to his observation when rightfully in a house or office is not an unconstitutional seizure.

An interesting case on this question is *State* v. *Mausert* (88 N. J. Law, p. 286). In that case an officer arrested the proprietor of a hotel on a charge of keeping a disorderly house. The arrest was made in the hotel office and under a proper warrant. There was, however, no search warrant; but upon making the arrest the officer seized and took with him the hotel register, which tended to show the character of the house. The constitution of New

Jersey contained a provision identical with the Fourth Amendment. A seasonable application was made to the court for the return of the register. The court, however, held that the officer had rightfully entered the hotel; that the register was open to the observation of the public and was under the control of the accused; and that therefore the officer did not infringe any constitutional rights when he took it and held it as evidence.

The cases already cited emphasize the fact that the act of an officer in taking and retaining evidence found in the house of the accused is not unconstitutional when it is not preceded by an unlawful entry or search. In *Adams* v. *New York*, *supra*, officers entered a house with a proper search warrant authorizing them to seize policy slips as gambling paraphernalia. As a result they seized a large number of such slips, but also seized certain other papers, which furnished evidence for the purpose of identifying certain handwriting and to show that the slips belonged to the accused. The court stated the question involved to be—

> were the papers found in the execution of the search warrant, which had a legal purpose in the attempt to find gambling paraphernalia, competent evidence against the accused? (Id., p. 597.)

And added:

> We think there was no violation of the constitutional guaranty of privilege from unlawful search or seizure in the admission of this testimony. (Id., p. 597.)

After stating that there could be no question of the right to seize under a search warrant lottery tickets and gambling devices, such as policy slips, the court said:

> But the contention is that, if in the search for the instruments of crime, other papers are taken, the same may not be given in evidence. As an illustration, if a search warrant is issued for stolen property and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these amendments. We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect. (Id. p. 598.)

And speaking in the *Weeks case, supra*, of the *Adams case*, it was said that the court—

> put its decision upon the ground that the papers found in the execution of the search warrant, which warrant had a legal purpose in the attempt to find gambling paraphernalia, were competent evidence against the accused, and their offer in testimony did not violate his constitutional privilege against unlawful search or seizure, for it was held that such incriminatory documents thus discovered were not the subject of an unreasonable search and seizure, and in effect that the same were inci-

> dentally seized in the lawful execution of a warrant and not in the wrongful invasion of the home of the citizen and the unwarranted seizure of his papers and property. (Id. p. 395.)

These decisions make it clear that if the entry and whatever search is made are made lawfully, any evidence that may be incidentally obtained while thus acting lawfully is not obtained through an unconstitutional search and seizure. In the present case, even if Cohen had been an officer, it could not be said that he entered the office of Gouled or obtained access to his papers unlawfully, for the certificate excludes all idea of force or legal compulsion as a result of which any search was made or information obtained.

The answer to Question 1 should be "no."

Because the conduct of Cohen had none of the ingredients necessary to constitute an unconstitutional search and seizure, the first question must be answered in the negative.

This follows, I think, from the facts as certified. As stated above, however, the actual facts are that Cohen went to Gouled's office when Gouled was present and had a friendly conversation with him. There were lying on top of a flat-top desk, and open to his observation, the papers in question. When Gouled temporarily left the office Cohen picked these up and put them in his pocket. If, therefore, there can be any doubt as to the proper answer to be made to this question upon the facts as certified, it is again suggested that the court, instead of making

an answer to the question, which might be misleading, should require the entire case to be certified for decision.

II.

"Is the admission of such paper writing in evidence against the same person when indicted for crime a violation of the Fifth Amendment."

This question, when applied to the facts certified, is whether the admission in evidence of a paper obtained in the manner described in Question 1 violates the Fifth Amendment, when the question is raised only by an objection made at the time the paper is offered in evidence.

It is not a valid objection to the use of papers in evidence that they have been seized as the result of an unreasonable search and their admission is not error unless the court has committed a previous error in refusing, upon application seasonably made, to order them returned.

Only one paper obtained by Cohen was introduced in evidence. Gouled did not know of its loss until it was offered on the trial. He then objected to its introduction upon the ground that it had been obtained through a violation of the rights secured to him by the Fourth Amendment and that its use in evidence would be to compel him to testify against himself, in violation of the Fifth Amendment. Even if it be assumed that there had been an unconstitutional search and seizure, the court was not in error in overruling this objection.

If there is one proposition in this case which has been settled beyond the shadow of a doubt, it is that an objection made for the first time on the trial that

evidence offered, which is otherwise competent, has been unlawfully obtained, will not avail.

In the *Boyd case, supra*, the defendant had not parted with the possession of the papers when he was put on trial. In the progress of the trial he produced them, in obedience to an order made by the court itself. Not having previously lost possession of the papers there was, of course, no occasion for him to apply for their return before the trial. His rights were not invaded until, during the trial, he was compelled by an order of the court, which was held to be equivalent to an unreasonable search and seizure, to produce them. His complaint was the same that it would have been if the court had compelled him to give oral testimony upon pain of being committed for contempt. The case, therefore, dealt only with the question as to what constitutes an unreasonable search and seizure or a compelling of the accused to testify against himself. The court did not have before it, and hence did not deal with the question, as to what were the remedies of a party aggrieved by a violation of the rights secured to him by the Fourth Amendment.

It was assumed in some quarters, however, that if evidence was secured as the result of an unreasonable search and seizure its use in evidence could be prevented by an objection made on the trial. And the opinion in the *Adams case, supra*, seems to have been written to clear up the uncertainty which the court apparently felt existed as a result of the opinion in the *Boyd case*. The *Adams case* was a prosecu-

tion in a State court and came to this court from the court of last resort of the State of New York. Mr. Justice Day, at the outset, called attention to the fact that the Fourth Amendment was a limitation upon the powers of the Federal Government and had no relation to the powers of State governments. The case could very well have been disposed of upon this proposition. The question suggested, however, was expressly pretermitted, and obviously because the court felt impelled to make it clear that the *Boyd case* did not change the well-established rule that, when evidence is offered that is otherwise competent, the court can not be required to stop and inquire into whether it has been rightfully or wrongfully obtained. The *Boyd case* had determined the rights of the accused, but had not dealt with his remedies.

In the *Adams case*, as in this case, the objection was for the first time made on the trial. The court said:

> The question was not made in the attempt to resist an unlawful seizure of the private papers of the plaintiff in error, but arose upon objection to the introduction of testimony clearly competent as tending to establish the guilt of the accused of the offense charged. In such cases the weight of authority as well as reason limits the inquiry to the competency of the proffered testimony, and the courts do not stop to inquire as to the means by which the evidence was obtained. The rule is thus laid down in Greenleaf, vol. 1, sec. 254*a*:

> "It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question." (Id. pp. 594–595.)

Many other authorities to the same effect were quoted and the court added:

> In this court it has been held that if a person is brought within the jurisdiction of one State from another, or from a foreign country, by the unlawful use of force, which would render the officer liable to a civil action or in a criminal proceeding because of the forcible abduction, such fact would not prevent the trial of the person thus abducted in the State wherein he had committed an offense. *Ker* v. *Illinois*, 119 U. S. 436; *Mahon* v. *Justice*, 127 U. S. 700. (Id. p. 596.)

After calling attention to the fact that the action complained of in the Boyd case was the requiring the accused at the trial to produce his papers by order of the court, that case was distinguished as follows:

> The Supreme Court of the State of New York, before which the defendant was tried, was not called upon to issue process or make any order calling for the production of the

> private papers of the accused, nor was there any question presented as to the liability of the officer for the wrongful seizure, or of the plaintiff in error's right to resist with force the unlawful conduct of the officer, but the question solely was, were the papers found in the execution of the search warrant, which had a legal purpose in the attempt to find gambling paraphernalia, competent evidence against the accused? We think there was no violation of the constitutional guaranty of privilege from unlawful search or seizure in the admission of this testimony. Nor do we think the accused was compelled to incriminate himself. He did not take the witness stand in his own behalf, as was his privilege under the laws of the State of New York. He was not compelled to testify concerning the papers or make any admission about them. (Id. pp. 597, 598.)

While adhering to the rule of the *Boyd case* that the Fourth Amendment guaranteed security in person and property and against unlawful invasion of the sanctity of the home by officers of the law, acting under legislative or judicial sanction, and gave a remedy against such usurpations when attempted, the court added:

> But the English and nearly all of the American cases have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent. In Boyd's case the law held unconstitutional, virtually compelled the defendant to furnish testimony against himself

> in a suit to forfeit his estate, and ran counter to both the Fourth and Fifth Amendments. (Id. p. 598.)

It was accordingly held that the question, being raised only by an objection made to the admission of evidence offered on the trial, could not be entertained by the court. This settled the proposition that the mere fact that evidence had been obtained through an unlawful search and seizure did not of itself make the admission of such evidence equivalent to compelling a defendant to testify against himself. What, if any, means were available to the accused to prevent papers so obtained from being offered in evidence against him was, of course, not determined.

Next came the *Weeks case, supra.* The *Adams case* was limited to the case of one who merely objected on the trial of the criminal case to the introduction of evidence obtained by an unlawful search and seizure. The *Weeks case,* on the other hand, dealt with the right of the accused, in a proper proceeding instituted before the trial of the criminal case, to have returned to him private papers which had been unlawfully taken. Before the time for the trial, Weeks filed a petition praying the return of the private papers which had been taken from his house by police officers and the United States marshal. This was refused. After the jury had been sworn and before any evidence had been given, he urged his petition again, but was again overruled. When the papers

were offered in evidence he objected, but his objection was overruled. In stating the case the court said:

> The accused, without awaiting his trial, made timely application to the court for an order for the return of these letters, as well as other property. This application was denied, the letters retained and put in evidence, after a further application at the beginning of the trial, both applications asserting the rights of the accused under the Fourth and and Fifth Amendments to the Constitution. (Id. p. 393.)

The *Adams case* was referred to and the rule that a mere objection made on the trial is not sufficient to justify the exclusion of such evidence reaffirmed, the court saying:

> It is therefore evident that the *Adams case* affords no authority for the action of the court in this case when applied to in due season for the return of papers seized in violation of the constitutional amendment. The decision in that case rests upon incidental seizure made in the execution of a legal warrant and in the application of the doctrine that a collateral issue will not be raised to ascertain the source from which testimony, competent in a criminal case, comes. (Id. p. 396.)

Reaching the conclusion that the papers had been illegally seized and that the judgment should therefore be reversed, the court placed its judgment squarely upon the error in refusing to return

the papers upon the making of a seasonable application, saying that—

> there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed. (Id. p. 398.)

The point is that the use of such evidence on the trial is error only in the event the court has previously erroneously declined to return the papers. Such papers, having been taken from the defendant in violation of his rights under the Fourth Amendment, and the court having ratified this action by refusing to return them, it can fairly be said that they are papers which on the trial ought to have been in the possession of the defendant. In that event he could not be required to produce them. Hence when they are produced it can justly be said that they constitute evidence which has been extorted from him by physical or moral compulsion, and he has thus been compelled to testify against himself. (*Holt* v. *United States*, 218 U. S. 245, 252, 253.)

Manifestly this must be true, because the protection to private papers given by the Fourth Amendment applies only while they are in the possession of the owner. The right guaranteed to him is protection against having to part with them contrary to his own will. If they pass from his possession, either by his voluntary act or without the use, on the part

of the Government, of force or compulsion against him, any person holding them may be required to produce them in evidence without violating any of his constitutional rights. Mr. Justice Holmes, in *Johnson* v. *United States* (228 U. S. 457, 458), said:

> A party is privileged from producing the evidence but not from its production.

This was said in a case in which the defendant had been indicted for concealing money from his trustee in bankruptcy. His books, which had passed into the custody of his trustee by operation of law, were offered in evidence against him. He objected on the ground that he was protected by the Constitution against their use.

In an earlier case, *Matter of Harris* (221 U. S. 274), a bankrupt had resisted an order of the District Court requiring him to deposit his books of accounts in the office of the receiver upon the ground that they tended to incriminate him. The court said:

> But no constitutional rights are touched. The question is not of testimony but of surrender—not of compelling the bankrupt to be a witness against himself in a criminal case, present or future, but of compelling him to yield possession of property that he no longer is entitled to keep. If a trustee had been appointed, the title to the books would have vested in him by the express terms of sec. 70, and the bankrupt could not have withheld possession of what he no longer owned, on the ground that otherwise he might be punished. That is one of the misfortunes of bankruptcy

> if it follows crime. The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story. (Id. pp. 279, 280.)

In that case the order requiring the books to be deposited with the receiver contained a provision that the receiver was not to use or permit them to be used for any criminal proceeding, and the court said:

> In the properly careful provision to protect him from use of the books in aid of prosecution the bankrupt got all that he could ask. (Id. p. 280.)

In the *Johnson case, supra*, it was assumed by counsel that what was said in the *Harris case* indicated that the books could not be properly used against the bankrupt in aid of a criminal prosecution, but Mr. Justice Holmes disposed of the contention in this language:

> Courts proceed step by step. And we now have to consider whether the cautious statement in the former case marked the limit of the law in a case where no rights, if there were any, were saved when the books were transferred. The answer was implied in that decision. * * *
>
> It is true that the transfer of the books may have been against the defendant's will, but it is compelled by the law as a necessary incident to the distribution of his property, not in order to obtain criminal evidence against him. Of course a man can not protect his property from being used to pay his debts by attaching

> to it a disclosure of crime. If the documentary confession comes to a third hand *alio intuitu*, as this did, the use of it in court does not compel the defendant to be a witness against himself. (Id. pp. 458, 459.)

The same doctrine was applied in *Perlman* v. *United States* (247 U. S. 7). That case involved the right of the accused to use private papers of the defendant which the latter had previously filed as exhibits to his testimony in a civil suit. The court said (page 15):

> But Perlman insists that he owned the exhibits and appears to contend that his ownership exempted them from any use by the Government without his consent. The extent of the insistence is rather elusive of measurement. It seems to be that the owner of property must be considered as having a constructive possession of it wherever it be and in whosoever hands it be, and it is always, therefore, in a kind of asylum of constitutional privilege, and to be of avail the contention must be pushed to this extreme. It is opposed, however, by all the cited cases. They, as we have said, make the criterion of immunity not the ownership of property but the "physical or moral compulsion" exerted.

These cases make it clear that the fact that the documents are the private papers of an accused does not of itself preclude the use of such papers in evidence. It is only when, by force or legal compulsion, the accused himself is required to produce them that his constitutional rights are invaded. If he places

them in the custody of a third person, that person may be required to produce them in evidence, although knowledge of their existence may have come to the Government through a breach of confidence or trust on the part of the custodian. If he loses them and they are found by an officer of the law or any other person, they may be used in evidence against him. If they consist of books and papers the title to which under the bankruptcy law passes to a trustee in bankruptcy, they may be used against him. If he shows them to a friend and, on the trial, declines to produce them, that friend may be required to testify to their contents. If they are stolen from him, the thief may be required to produce them in evidence against him. Indeed, his sole privilege is not to be compelled by force or legal compulsion to himself produce them.

It is for these reasons that when private papers are taken as the result of an unreasonable search and seizure, and the accused acquiesces by making no effort to have them returned to him before the trial, his rights are not violated if another is required to produce them on the trial. In such a case what he is entitled to is to have the papers returned to him so that on the trial they will be in his possession. If he waives this right or does not avail himself of it, the papers when produced by another are competent evidence against him. This has been the rule in every case decided by this court. It has been nearly if not quite universally made the rule by State courts in dealing with similar provisions of

State constitutions. In support of this statement it is only necessary to cite the case of *Cohen* v. *State* (120 Tenn. 61), in which numerous decisions of other State courts are cited.

The plaintiff in error, of course, suggests that he could not have proceeded earlier to secure the return of the paper taken by Cohen because he did not know that it had been taken until it was offered in evidence. This can not avail him. No authority can be cited for making such an exception to the general rule which is so well established. The rule may almost be said to be one of necessity in order to secure fair trials. Orderly procedure will be impossible if the court must stop to determine whether any improper practices have been resorted to to secure any evidence that is offered. To do this is equally inconsistent with orderly procedure, whether the defendant knew or did not know that the evidence offered had been obtained. It is respectfully submitted that there is no exception to the rule and that, therefore, the plaintiff in error is not now in a position to complain, in an appellate court, of either the original taking of the paper in question or of its use in evidence on account of the manner of its taking.

It follows that Question 2 must be answered in the negative, regardless of how Question 1 may be answered.

PART TWO.

I.

"Are papers of no pecuniary value but possessing evidential value against persons presently suspected and subsequently indicted under sections 37 and 215, U. S. C. C., when taken under search warrants issued pursuant to Act of June 15, 1917, from the house or office of the person so suspected, seized and taken in violation of the Fourth Amendment?"

The certificate shows that one of the papers referred to was taken under a search warrant issued June 17, 1918, and the other two under a search warrant issued July 22, 1918. Both search warrants were issued under Title XI of the Act of June 15, 1917 (40 Stat. c. 30, p. 228). Neither the warrants nor the affidavits upon which they were issued are set out in full. No question is therefore raised as to their sufficiency with respect to properly describing the property to be seized or the place to be searched. It appears from the certificate that the search warrant of June 17 authorized a search of Gouled's office for certain contracts of Gouled and S. Lavinsky, and that the affidavit stated that these contracts were used as the means of committing a felony—a violation of section 39 of United States Criminal Code—in that Gouled did use the said contracts as means for the bribery of a certain officer of the United States. Under this warrant an unexecuted written agreement between Lavinsky and Gouled was seized, delivered to the United States district attorney, and afterwards used in evidence.

The search warrant of July 22 authorized a search of Gouled's office for "certain letters, papers, docu-

ments, and writings," the description of which in the affidavit and search warrant is omitted from the certificate, but which it was stated "relate to, concern, and have been used in the commission of a felony, to wit, a conspiracy to defraud the United States." Under this warrant there was seized (1) a written and signed contract between Gouled and one Steinthal and (2) a bill of disbursements and professional services rendered to Gouled by his attorney. The latter was subsequently introduced in evidence. The former was not offered, but a duplicate was produced by Steinthal and introduced.

The certificate states that all the papers seized under these warrants belonged to Gouled and had no pecuniary value except as so much paper stock, but constituted evidence more or less injurious to Gouled under the indictment subsequently found.

Gouled was not indicted for any offense covered by section 39 of the United States Criminal Code, but was indicted for a conspiracy to defraud the United States in violation of section 37 of the United States Criminal Code and also for a conspiracy to violate section 215 of the United States Criminal Code.

Title XI, section 2, of the Act of June 15, 1917 (40 Stat. c. 30, p. 228), enumerates the cases in which a search warrant may be issued upon proper affidavit. The second case enumerated is:

> When the property was used as the means of committing a felony; in which case it may be

> taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.

The certificate states that, before the trial, a motion was made by Gouled to compel the United States district attorney to return these papers, but it was denied, and that the action of the district court in denying this motion before trial is not assigned for error in the Circuit Court of Appeals.

In the light of these facts, the question quoted above is whether a paper of no pecuniary value, but possessing evidential value, taken under a search warrant issued under the authority of the Act of June 15, 1917, and, on its face, complying fully with the requirements of that Act, is taken in violation of the Fourth Amendment.

Private papers are property whether they possess pecuniary value or not.

The Act of June 15, 1917, expressly authorizes search warrants for *property* which has been used as the means of committing a felony. Apparently, the Circuit Court of Appeals submits the question as to whether a private paper possessing in and of itself no pecuniary value is property within the meaning of this statue. That one's private papers are his property in the fullest sense of that word, regardless of whether they may possess any value to another, can scarcely be doubted. In the *Boyd* case, *supra*,

this court quoted with approval the language of Lord Camden as follows:

> Papers are the owner's goods and chattels; they are his dearest property (116 U. S. p. 627).

Unless, therefore, it can be said that no contract between parties can be used as the means of committing a crime, it must be held that these search warrants were valid and authorized the officer to make the search and seizure. Just what the nature of the contracts described in the first search warrant was does not appear from the certificate. The affidavit, however, alleged that they had been used as the means for the bribery of a certain officer of the United States. If, therefore, a contract of any kind could be used as the means of bribing an officer, there can scarcely be a question as to the validity of this search warrant. And, in the light of common knowledge as to methods pursued by crooks endeavoring to defraud the Government in the matter of war contracts, it is not at all difficult to see how such a contract could be so used. The obvious method of proceeding in such matters was for the person desiring to corrupt officials charged with the duty of letting contracts to represent to contractors that he was able to secure contracts for them and would do so for a consideration. Contracts were then made between this intermediary and the contractor by which, in the event a contract was secured, the former should receive either a fixed amount or a definite part of the profits. Armed with this contract, the

intermediary was prepared to approach the official whom he desired to corrupt. If the official was willing to be corrupted, it would be necessary to insure in some way the receipt by him of the price. A contract giving the intermediary a part of the profits, and a proposition to divide this, were the ready means of accomplishing the bribery. Plainly, therefore, there is nothing on the face of the affidavit from which it can be said that the use of the contracts mentioned as the means of accomplishing the crime was impossible. The same is true of the contract seized under the second search warrant.

This of itself would amply justify a negative answer to the question stated.

Even if the particular papers seized and subsequently used in evidence were not such that they could have been lawfully made the object of a search warrant, their seizure can not from this record be said to have been in violation of the Fourth Amendment.

Whether the papers afterwards introduced in evidence were the particular papers described in the affidavits does not appear from the certificate. The first affidavit described certain *contracts* of certain persons. No completed contract seems to have been seized. An unexecuted contract between the parties named, however, was seized. The certificate omits the specific description of the papers described in the second affidavit. Under the search warrant issued upon this affidavit an unknown number of papers were taken. Only two of these, however, were used in evidence; and it does not appear whether they were specifically described in the affidavit.

As seen above, these affidavits and search warrants justified a search for and seizure of the papers described. When the officer went to the office, however, he was serving a warrant which had a legal purpose in the attempt to find the papers described. In making the search, therefore, he was acting legally; and if, while so acting, he discovered evidence of crime and took it, he did not violate the rights of Gouled under the Fourth Amendment. This is exactly what was held in the *Adams case, supra.* This furnishes another sufficient reason for answering the question stated in the negative.

An Act of Congress which authorizes a search warrant for property which has been used in the commission of a felony is not subject to constitutional objections.

If the question stated can be construed as an inquiry into the constitutionality of the Act of June 15, 1917, it must still be answered in the negative.

The Fourth Amendment gives protection only against unreasonable searches. That searches of one's house or office may lawfully be made for various purposes can not be seriously questioned. It may be assumed that, in general, the citizen is protected against the seizure of his private papers for the purpose of using them as evidence against him. This applies, however, only to papers which are his own and to the possession of which he is entitled as against the world. If he holds them as custodian for another, that other being entitled to their possession or production, he can be compelled to produce them, and the service of a search warrant to discover

them would be no violation of his constitutional rights. He may also have so used his property as that the Government has an interest in it, or is entitled to its possession. Many of the cases in which the Fourth Amendment gives no protection against searches and seizures have been mentioned in decisions of this court. In the *Boyd case, supra,* it was said (pages 623, 624):

> The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. * * * So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, &c., are not within this category. Many other things of this character might be enumerated. The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a seques-

> tration, or an execution, is not within the prohibition of the Fourth or Fifth Amendment, or any other clause of the Constitution; nor is the examination of a defendant under oath after an ineffectual execution, for the purpose of discovering secreted property or credits, to be applied to the payment of a judgment against him, obnoxious to those amendments.

And in *Adams* v. *New York*, *supra*, it was said:

> The right to issue a search warrant to discover stolen property or the means of committing crimes, is too long established to require discussion. The right of seizure of lottery tickets and gambling devices, such as policy slips, under such warrants, requires no argument to sustain it at this day. (Id. p. 598.)

The search warrant being valid, and the act of the officer in serving it lawful, there was no violation of Gouled's constitutional rights in taking evidence of crime found while lawf ully serving the search warrant, and for this reason the question stated must be answered in the negative.

II.

"If such papers so taken are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime of which he was accused in the affidavit for warrant, is such admission in evidence a violation of the Fifth Amendment?"

If I am correct in the answer I have made to the preceding question, this question of course answers itself. It can not be pretended for a moment that,

if the seizure did not violate Gouled's constitutional rights, he was entitled to have the property returned to him, and its use in evidence did not compel him to testify as a witness. But if it be assumed that the seizure was in violation of the Fourth Amendment, it by no means follows that the Fifth Amendment was violated when the papers were admitted in evidence. As we have seen above, the right to have excluded from evidence in a criminal case papers previously seized, is not the remedy to which the Fourth Amendment entitles the accused to redress wrongs committed in violation of that amendment. For this reason, if prior to the trial proper steps are not taken to have the seized papers returned to the accused's possession, they are admissible in evidence against him. Moreover, when a case is reversed on account of the admission of such evidence, the reversible error is not in the admission of the papers but in the previous refusal to return them. The right of the court officials to retain and use them having been previously determined, the court, when the trial begins, properly treats that question as settled. There is, therefore, no ground upon which the papers can properly be excluded and no error in admitting them. If the accused desires to preserve his rights, his remedy is to secure a review of the action of the court in refusing to return his papers. If he does not, before the trial, invoke the judgment of the court on his right to have the papers returned, it can not now be seriously doubted that he can not complain when

they are afterwards used against him. Likewise, if he has invoked such action, and it has been adverse to him, and he does not choose to invoke the judgment of the appellate court upon that question, he must be deemed to have acquiesced in the ruling and elected to stand on his right to object to the evidence on the trial without regard to any previous action.

In this case the accused did make a seasonable application for the return of his papers. The application was overruled and the certificate contains the significant statement that the assignments of error in the Circuit Court of Appeals do not call this ruling in question. The Circuit Court of Appeals, not having before it for review, therefore, the denial of Gouled's application for the return of his papers, must assume that that ruling was correct. And if it was correct, of course, the papers were properly admitted in evidence. This is the rule which must obtain unless it can be said to be inapplicable because of one other thing that occurred. At the trial and at just what stage does not appear, except that it was before any testimony had been offered, Gouled renewed his motion previously denied and again, but on the same papers, demanded the return of all papers and documents seized under the search warrants. A judge other than the one who had denied the motion was presiding at the trial. The certificate states that he followed the ruling of his colleague and denied the motion, to which exception was taken. This can not operate to change the rule.

In the first place, the rule requires the application to be made before the trial. No decision can be found in which any distinction is made between an application of this kind made at one stage of the trial rather than at another. The decisions are to the effect that it must be made before the trial and not merely before any evidence is offered.

Moreover, when a question has once been submitted to the court and decided and is again submitted without anything new in support of the contention, the court may very properly decline to hear it again, on the ground that it had already been passed on in that case. Particularly is this true when the previous ruling has been made by a judge other than the one presiding on the trial. In such cases, the error, if any, is in the original ruling and not in the refusal to again consider the question. And, since the plaintiff in error does not now complain of the original ruling, the certificate shows that there is nothing before the court of appeals upon which error in the introduction of this evidence can be predicated.

III.

"If in the affidavit for search warrant under act of June 15, 1917, the party whose premises are to be searched be charged with one crime and property be taken under the warrant issued thereon, can such property so seized be introduced in evidence against said party when on trial for a different offense?"

This question would seem to be answered by what has already been said. It has been seen that if, during the service of a valid search warrant, documen-

tary evidence is discovered and taken, although not called for by the search warrant, its introduction in evidence does not violate any constitutional rights of the accused. The point is that no unlawful search has been made, and hence the taking of the evidence, when found, does not violate the Fourth Amendment. Much more, therefore, must it be true that, if upon examination of papers so obtained, whether named in the search warrant or incidentally taken, it appears that the accused has committed a different offense from that which it was supposed he had committed, the evidence is still admissible. The cases cited establish that the taking of these papers was not illegal or unconstitutional. That being true, the Government could undoubtedly use them for the purpose of convicting the defendant of any crime which they might tend to show he had committed.

IV.

"If papers of evidential value only be seized under a search warrant and the party from whose house or office they are taken be indicted, if he then move before trial for the return of said papers and said motion is denied, is the court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted?"

Apparently what the court had in mind in submitting this question was that it could not, under the assignments of error, inquire into the original ruling denying a return of the papers. In other words, when the accused does not invoke the judgment of the appellate court as to this ruling, can the trial court be

put in error when on the trial that ruling was followed and the evidence admitted? We have seen that the method which the Constitution gives the accused of redressing a wrong committed in violation of his rights under the Fourth Amendment is not to have the evidence excluded but rather to have it returned to his possession so it can not be produced. It is settled that the production of evidence of one's private papers by another is not compelling him to testify and does not violate the Fifth Amendment. The error, if any, in this case was in the action of the court prior to the trial in denying the application for a return of the papers. Unless that ruling can be reviewed and reversed, there was manifestly no error in admitting the evidence. If there was an assignment of error seeking to review that ruling, and this court should conclude that the ruling was correct, that would be an end to the inquiry. Since Gouled has not sought a reversal of that ruling, it can not be reversed; and for this case, at least, it is established that he did not have the right to have his papers returned to him. This being true, they were properly admitted in evidence when offered by another. The answer to this question must be "No."

I have discussed, I fear, these questions at unnecessary length. I submit that the answers to the questions should be as suggested above or else that the entire case should be certified to this court for decision.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

DECEMBER, 1920.

APPENDIX.

By Mr. LITTLETON:

Q. When did you go to Mr. Gouled's office?—A. This was about January or February.

Q. That is, 1918?—A. Yes, sir.

Q. You were then in the Military Intelligence?—A. Practically as a volunteer operator.

Q. I did not hear you.—A. Practically, I was a volunteer operator.

Q. But you were acting for the Government?—A. Yes, sir.

Q. And under the directions of the Government?—A. Yes, sir.

Q. And under the direction of the United States Government officers?—A. Yes, sir.

Q. And you went there under their direction?—A. Yes, sir.

Q. Did you have any warrants?—A. No. sir.

Q. What?—A. No, sir.

Q. Did you go to his office alone?—A. Yes, sir.

Q. Did you see anybody in his office?—A. Yes, sir.

Q. Who did you see?—A. Mr. Gouled.

Q. Did you talk with him?—A. Yes, sir.

Q. You say you took the papers from his office?—A. Yes, sir.

Q. Did he give them to you?—A. No, sir.

Q. Did he see you take them?—A. No, sir.

Q. Did you take them while he was not looking?—A. Yes, sir.

Q. From what place in the office did you take them?—A. From the desk.

Q. From his desk?—A. Yes, sir.

Q. From the drawer of the desk?—A. No, sir.

Q. From the top of the desk?—A. Yes, sir.

Q. Was it a flat-top desk?—A. Yes, sir.

Q. Where was he when you took them?—A. He stepped out for a minute, I think.

Q. Did you say anything to him about taking them?—A. No, sir.

Q. Either before or after you took them?—A. No, sir.

Q. Were you acting under the direction of your superior at the time you took them?—A. Yes, sir.

Q. And you returned them to your superior?—A. Yes, sir.

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SUPREME COURT OF THE UNITED STATES.

No. 250.—October Term, 1920.

Felix Gouled, vs. The United States.	On a Certificate from the United States Circuit Court of Appeals for the Second Circuit.

[February 28, 1921.]

Mr. Justice Clarke delivered the opinion of the Court.

In a joint indictment the plaintiff in error, Gouled, one Vaughan, an officer of the United States Army, and a third, an attorney at law, were charged in the first count, with being parties to a conspiracy to defraud the United States, in violation of Section 37 of the Federal Criminal Code, and, in the second count, with having used the mails to promote a scheme to defraud the United States, in violation of Section 215 of that Code. Vaughan pleaded guilty, the attorney was acquitted, and Gouled, whom we shall refer to as the defendant, was convicted, and thereupon prosecuted error to the Circuit Court of Appeals, which certifies to this Court six questions which we are to consider.

Of these questions, the first two relate to the admission in evidence of a paper surreptitiously taken from the office of the defendant by one acting under direction of officers of the Intelligence Department of the Army of the United States, and the remaining four relate to papers taken from defendant's office under two search warrants, issued pursuant to the Act of June 15, 1917 (40 Stat. 217, 228). It was objected on the trial, and is here insisted upon, that it was error to admit these papers in evidence because possession of them was obtained by violating the rights secured to the defendant by the Fourth and Fifth Amendments to the Constitution of the United States.

The Fourth Amendment reads:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable

cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

The part of the Fifth Amendment here involved reads:

"No person . . . shall be compelled in any criminal case to be a witness against himself."

It would not be possible to add to the emphasis with which the framers of our Constitution and this Court (in *Boyd* v. *United States*, 116 U. S. 816, in *Weeks* v. *United States*, 232 U. S. 383, and in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is: that such rights are declared to be indispensable to the "full enjoyment of personal security, personal liberty and private property"; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen,—the right, to trial by jury, to the writ of *habeas corpus* and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or "gradual depreciation" of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers.

In the spirit of these decisions we must deal with the questions before us.

The facts derived from the certificate, essential to be considered in answering the first two questions, are: that in January, 1918, it was suspected that the defendant, Gouled, and Vaughan were conspiring to defraud the Government through contracts with it for clothing and equipment; that one Cohen, a private in the Army, attached to the Intelligence Department, and a business acquaintance of defendant Gouled, under direction of his superior officers, pretending to make a friendly call upon the defendant, gained admission to his office and in his absence, without warrant of any character, seized and carried away several documents; that one of these papers, described as "of evidential value only" and belonging to Gouled, was subsequently delivered to the United States District Attorney and was by him introduced in evidence over the objec-

tion of the defendant that possession of it was obtained by a violation of the Fourth or Fifth Amendment to the Constitution; and that the defendant did not know that Cohen had carried away any of his papers until he appeared on the witness stand and detailed the facts with respect thereto as we have stated them, when, necessarily, objection was first made to the admission of the paper in evidence.

Out of these facts arise the first two questions, both relating to the paper thus seized. The first of these is:

"Is the secret taking, without force, from the house or office of one suspected of crime of a paper belonging to him, of evidential value only, by a representative of any branch or subdivision of the Government of the United States, a violation of the 4th amendment?"

The ground on which the trial court overruled the objection to this paper is not stated, but from the certificate and the argument we must infer that it was admitted either because it appeared that the possession of it was obtained without the use of force or illegal coercion, or because the objection to it came too late.

The objection was not too late, for, coming as it did promptly upon the first notice the defendant had that the Government was in possession of the paper, the rule of practice relied upon, that such an objection will not be entertained unless made before trial, was obviously inapplicable.

The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a Government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.

Without discussing them, we cannot doubt that such decisions as there are in conflict with this conclusion are unsound, and that,

whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the Government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment, and therefore the answer to the first question must be in the affirmative.

The second question reads:

"Is the admission of such paper in evidence against the same person when indicted for crime a violation of the 5th amendment?"

Upon authority of the *Boyd* case, *supra,* this second question must also be answered in the affirmative. In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case.

The remaining four questions relate to three other papers which were admitted in evidence on the trial over the same constitutional objections as were interposed to the admission of the first paper. One was an unexecuted form of contract between the defendant and one Lavinsky, another was a written contract, signed by the defendant and one Steinthal, and the third was a bill for disbursements and professional services rendered by the attorney at law to the defendant Gouled.

Of these papers, the first was seized in defendant's office under a search warrant, dated June 17, and the other two under a like warrant dated July 22, 1918, each of which was issued by a United States Commissioner on the affidavit of an agent of the Department of Justice. It is certified that it was averred in the first affidavit that there were in Gouled's office . . . "certain property, to wit: Certain contracts of the said Felix Gouled with S. Lavinsky which were used as a means of committing a felony, to wit . . . as a means for the bribery of a certain officer of the United States." It is also certified that the second affidavit declared that Gouled had at his office "Certain letters, papers, documents and writings which relate to and have been used in the commission of a felony,

to wit: a conspiracy to defraud the United States." Neither the affidavits nor the warrants are given in full in the certificate but no exception was taken to the sufficiency of either.

After the seizure of the papers, a joint indictment was returned, as stated, against Gouled, Vaughan and the attorney, and before trial a motion was made by Gouled, for a return of the papers seized under the search warrants, which was denied, and when the motion was renewed at the trial, but before any evidence was introduced, it was again denied. The denial of this motion is not assigned as error.

The contract of the defendant with Steinthal, which was seized under the warrant, was not offered in evidence but a duplicate original, obtained from Steinthal, was admitted over the objection that the possession of the seized original must have suggested the existence and the obtaining of the counterpart, and that therefore the use of it in evidence would violate the rights of the defendant under the Fourth or Fifth Amendment. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385. The unsigned form of contract and the attorney's bill were offered and also admitted over the same constitutional objection. There is no statement in the certificate of the contents of these papers, but it is said of them only, that they belonged to Gouled, that they were without pecuniary value and that they constituted evidence "more or less injurious to the defendant."

It is apparent from this statement that to answer the remaining four questions involves a consideration of the applicable law of search warrants.

The wording of the Fourth Amendment implies that search warrants were in familiar use when the Constitution was adopted and, plainly, that when issued "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized", searches, and seizures made under them, are to be regarded as not unreasonable, and therefore not prohibited by the Amendment. Searches and seizures are as constitutional under the Amendment when made under valid search warrants as they are unconstitutional, because unreasonable, when made without them,—the permission of the Amendment has the same constitutional warrant as the prohibition has, and the definition of the former restrains the scope of the latter.

All of this is abundantly recognized in the opinions of the *Boyd* and *Weeks* cases, *supra,* in which it is pointed out that at the time the Constitution was adopted stolen or forfeited property, or property liable to duties and concealed to avoid payment of them, excisable articles and books required by law to be kept with respect to them, counterfeit coin, burglars' tools and weapons, implements of gambling "and many other things of like character" might be searched for in home or office and if found might be seized, under search warrants, lawfully applied for, issued and executed.

Although search warrants have thus been used in many cases ever since the adoption of the Constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law and as the result of the *Boyd* and *Weeks* cases, *supra,* they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken. *Boyd* case, pp. 623, 624.

There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant. Stolen or forged papers have been so seized, *Langdon* v. *People,* 133 Ill. 382, and lottery tickets, under a statute prohibiting their possession with intent to sell them, *Commonwealth* v. *Dana,* 2 Metc. 329, and we cannot doubt that contracts may be so used as instruments or agencies for perpetrating frauds upon the Government as to give the public an interest in them which would justify the search for and seizure of them, under a properly issued search warrant, for the purpose of preventing further frauds.

With these principles of law in mind, we come to the remaining questions.

The third question reads:

"Are papers of no pecuniary value but possessing evidential value against persons presently suspected and subsequently indicted under Sections 37 and 215 of the United States Criminal Code, when taken under search warrants issued pursuant to the Act of June 15, 1917, from the house or office of the person suspected,—seized and taken in violation of the 4th Amendment?"

That the papers involved are of no pecuniary value is of no significance. Many papers, having no pecuniary value to others, are of the greatest possible value to the owners and are property of a most important character (*Boyd* case, *supra*, pp. 627, 628), and since those here involved possessed "evidential value" against the defendant, we must assume that they were relevant to the issue.

Restraining the questions to the papers described, and first as to the unexecuted form of contract with Lavinsky, a stranger to the indictment. While the contents of this paper are not given, it is impossible to see how the Government could have such an interest in such a paper that under the principles of law stated it would have the right to take it into its possession to prevent injury to the public from its use. The Government could desire its possession only to use it as evidence against the defendant and to search for and seize it for such purpose was unlawful.

Likewise the public could be interested in the bill of the attorney for legal services only to the extent that it might be used as evidence and the seizure of this also was unlawful.

As to the contract with Steinthal, also a stranger to the indictment. It is not difficult, as we have said, to imagine how an executed written contract might be an important agency or instrumentality in the bribing of a public servant and in perpetrating frauds upon the Government so that it would have a legitimate and important interest in seizing such a paper in order to prevent further frauds, but the facts necessary to give this contract such a character do not appear in the certificate. On the contrary, this third question recites that the papers are all of no pecuniary, but are of evidential, value, and in the sixth question it is recited that they are "of evidential value only," so that it is impossible to say, on the record before us, that the Government had any interest in it other than as evidence against the accused and therefore as to all three papers the answer to the question must be in the affirmative.

The fourth question reads:

"If such papers so taken are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime for which he was accused in the affidavit for warrant,—is such admission in evidence a violation of the 5th amendment?"

The same papers being involved, the answer to this question must be in the affirmative for, they having been seized in an unconstitutional search, to permit them to be used in evidence would be, in effect, as ruled in the *Boyd* case, to compel the defendant to become a witness against himself.

The fifth question reads:

"If in the affidavit for search warrant under Act of June 15, 1917, the party whose premises are to be searched be charged with one crime and property be taken under the warrant issued thereon, —can such property so seized be introduced in evidence against said party when on trial for a different offence?"

It has never been required that a criminal prosecution should be pending against a person in order to justify search for and seizure of his property under a proper warrant, if a case of crime having been committed and of probable cause is made out sufficient to satisfy the law and the officer having authority to issue it, and we see no reason why property seized under a valid search warrant, when thus lawfully obtained by the Government, may not be used in the prosecution of a suspected person for a crime other than that which may have been described in the affidavit as having been committed by him. The question assumes that the property seized was obtained on a search warrant sufficient in form to satisfy the law, and if the papers to which the question refers had been of a character to be thus obtained, lawfully, it would have been competent to use them to prove any crime against the accused as to which they constituted relevant evidence.

The sixth question reads:

"If papers of evidential value only be seized under a search warrant and the party from whose house or office they are taken be indicted;—if he then move before trial for the return of said papers and said motion is denied—is the court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted?"

The papers being of "evidential value only" and having been unlawfully seized, this question really is, whether, it having been decided on a motion before trial that they should not be returned to the defendant, the trial court, when objection was made to their use on the trial, was bound to again inquire as to the unconstitutional origin of the possession of them. It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure and therefore it is not to be applied as a hard and fast formula to every case, regardless of its special circumstances. We think rather that it is a rule to be used to secure the ends of justice under the circumstances presented by each case, and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.

In the case we are considering the certificate shows that a motion to return the papers, seized under the search warrants, was made before the trial and was denied, and that on the trial of the case before another judge, this ruling was treated as conclusive, although, as we have seen, in the progress of the trial it must have become apparent that the papers had been unconstitutionally seized. The constitutional objection having been renewed, under the circumstances, the court should have inquired as to the origin of the possession of the papers when they were offered in evidence against the defendant.

Each question is answered, Yes.

A true copy.

Test:

Clerk Supreme Court, U. S.